

Insurance Counsel Journal

July, 1940

Vol. VII

No. 3

Annual Convention, September 4, 5 and 6, 1940
White Sulphur Springs, West Virginia

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Issued Quarterly by

International Association of Insurance Counsel

Massey Building :: Birmingham, Alabama

Entered as Second Class Mail Matter at the Post Office at Birmingham, Alabama

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1939-1940

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J. ROY DICKIE.....1935-1936

MARION N. CHRESTMAN.....1936-1937

P. E. REEDER.....1937-1938

MILO H. CRAWFORD.....1938-1939

PURPOSE

The purpose of this Association shall be to bring into close contact by association and communication lawyers, barristers and solicitors who are residents of the United States of America, or any of its possessions, or of the Dominion of Canada, or of the Republic of Cuba, or of the Republic of Mexico, who are actively engaged wholly or in part in practice of that branch of the law pertaining to the business of insurance in any of its branches, and to Insurance Companies; for the purpose of becoming more efficient in that particular branch of the legal profession, and to better protect and promote the interests of Insurance Companies authorized to do business in the United States or Dominion of Canada or in the Republic of Cuba, or in the Republic of Mexico; to encourage cordial intercourse among such lawyers, barristers and solicitors, and between them and Insurance Companies generally.

President's Page

THE 1940 Annual Convention of our Association should produce an attendance record. The membership has grown, and each year sees an active increase in interest by all members of the organization. The factors leading to a record attendance are present.

The time, September 4th, 5th and 6th, should give us the most delightful weather to be had in the Blue Ridge Mountains. The place, The Greenbrier and Cottages at White Sulphur Springs, West Virginia, cannot be excelled as a resort. The hotel rates are the usual, reasonable ones offered us at The Greenbrier, and appear elsewhere in this issue. Our convention precedes that of American Bar Association at Philadelphia the week of September 8th, making it possible for our members to easily attend both meetings on one trip. And, in these troubled times, it will be good to get together in the mountains of West Virginia and enjoy a respite from the turmoil and worries of these days. I repeat what I have often said before, that one of the great privileges of membership in this Association is the right to attend these annual conventions to renew acquaintanceships with good friends from every part of the country. Entertainment and recreation will be in full swing. A joyous time will be had.

I ask, as Mr. Milo H. Crawford asked last year, that the State Membership Committees urge the members of their states to attend.

Excellent papers have been prepared for the convention. The industrial world, the field of government, the industry of insurance and the practicing lawyers are well represented on the program.

Come prepared to enjoy yourselves. Bring your golf clubs, tennis rackets, swimming and riding clothes. Don't forget to bring your families. Let us all get together on September 4th, 5th and 6th at White Sulphur Springs, West Virginia.

GERALD P. HAYES,

President.

PROGRAM

INTERNATIONAL ASSOCIATION OF INSURANCE COUNSEL
1940 CONVENTION—WHITE SULPHUR SPRINGS, WEST VIRGINIA
SEPTEMBER 4TH, 5TH AND 6TH

TUESDAY, SEPTEMBER 3, 1940

8:30 P.M. Meeting of Executive Committee.

WEDNESDAY, SEPTEMBER 4, 1940

9:00 A.M. Registration of members and their Guests.

9:30 A.M. 1. Gavel.

2. Reading of Minutes.

3. Welcoming Address by Honorable Homer A. Holt, Governor of the State of West Virginia.

4. Response for Association by Paul J. McGough, Minneapolis, Minnesota.

5. Address of President.

6. Address "Insurance Litigation from a Claim Man's Point of View" by Harlan S. Don Carlos, former President, International Claim Association, and Manager of Life, Health and Accident Claim Department, Travelers Insurance Company, Hartford, Connecticut.

7. Appointment of Nominating Committee.

8. Report of Executive Committee.

9. Report of Secretary.

10. Report of Treasurer.

11. Report of General Legislative Committee by Howard D. Brown, Chairman.

12. Report of Home Office Counsel Committee by J. Mearl Sweitzer, Chairman.

13. Announcements by William O. Reeder, Chairman of Entertainment Committee, and by Mrs. Robert D. Dalzell, Chairman of Ladies' General Entertainment Committee.

Adjournment.

2:00 P.M. Ladies' Golf Tournament.
There will be no program in the afternoon.

6:15 P.M. Spring Room—Social Hour.

8:00 P.M. Dinner and Dancing.

PROGRAM

INTERNATIONAL ASSOCIATION OF INSURANCE COUNSEL
1940 CONVENTION—WHITE SULPHUR SPRINGS, WEST VIRGINIA
SEPTEMBER 4TH, 5TH AND 6TH

THURSDAY, SEPTEMBER 5, 1940

- 9:30 A.M. 1. Report of Committee on Unauthorized Practice of Law by Oscar J. Brown, Chairman.
2. Address "Disclaimer, Letters of Reservation of Rights and Non Waiver Agreements under Liability Insurance Policies" by Clinton M. Horn, Cleveland, Ohio.
3. Address "The Trend of the Times in Revision of Policy Forms and Broadening of Coverages" by J. Mearl Sweitzer, General Counsel, Employers Mutual Life Insurance Company, Wausau, Wisconsin.
4. Report of Committee on Casualty Insurance by F. B. Baylor, Chairman.
5. Report of Committee on Compulsory Automobile Insurance and Financial Responsibility Legislation, by Forrest S. Smith, Chairman.
6. Report of Committee on Fire and Marine Insurance by Charles W. Sellers, Chairman.

Adjournment.

2:00 P.M. Men's Golf Tournament.

2:30 P.M. Bridge Party.

8:00 P.M. Banquet, Entertainment and Dancing.

FRIDAY, SEPTEMBER 6, 1940

- 9:30 A.M. 1. Report of Committee on Fidelity and Surety Law by Clarence F. Merrell, Chairman.
2. Report of Committee on Health and Accident Insurance by Paul J. McGough, Chairman.
3. Report of Committee on Life Insurance by C. M. Vrooman, Chairman.
4. Report of Committee on Workmen's Compensation by Kenneth P. Grubb, Chairman.
5. Address "Automobiles" by William S. Knudsen, President, General Motors Corporation, Detroit, Mich.
6. Unfinished Business.
7. New Business.
8. Report of Nominating Committee—Election.
9. Introduction of New President and New Members of Executive Committee
10. Report of Golf Committee. Presentation of Golf and Bridge Prizes.
11. Adjournment by President Elect.
- 2:30 P.M. Meeting of New Executive Committee.

Convention Committees

RECEPTION COMMITTEE

The President and Mrs. Hayes	Wauwatosa, Wisconsin
Mr. and Mrs. Milo H. Crawford	Birmingham, Michigan
Mr. and Mrs. George W. Yancey	Birmingham, Alabama
Mr. and Mrs. James T. Blair, Jr.	Jefferson City, Missouri
Mr. and Mrs. L. J. Carey	Detroit, Michigan
Mr. and Mrs. Henry W. Nichols	New York City
Mr. and Mrs. Richard B. Montgomery, Jr.	New Orleans, Louisiana
Mr. and Mrs. Harvey E. White	Norfolk, Virginia
Mr. and Mrs. Robert W. Shackelford	Tampa, Florida
Mr. and Mrs. Wilson C. Jainsen	Hartford, Connecticut
Mr. and Mrs. Robert M. Noll	Marietta, Ohio
Mr. and Mrs. Willis Smith	Raleigh, North Carolina
Mr. and Mrs. Thomas N. Bartlett	Baltimore, Maryland
Mr. and Mrs. Pat H. Eager, Jr.	Jackson, Mississippi
Mr. Charles N. Orr	St. Paul, Minnesota
Mr. George M. Weichelt	Chicago, Illinois
Mr. Joe G. Sweet	San Francisco, California

GENERAL ENTERTAINMENT COMMITTEE

Mr. William O. Reeder, <i>Chairman</i>	St. Louis, Missouri
Mrs. Willis Smith	Raleigh, North Carolina
Mrs. Raymond N. Caverly	New York City
Mr. Lowell White	Denver, Colorado
Mr. Richard B. Montgomery, Jr.	New Orleans, Louisiana
Mr. Harvey E. White	Norfolk, Virginia

LADIES' GENERAL ENTERTAINMENT COMMITTEE

Mrs. Robert D. Dalzell, <i>Chairman</i>	Pittsburgh, Pennsylvania
Mrs. Forrest S. Smith	Jersey City, New Jersey
Mrs. Royce G. Rowe	Chicago, Illinois
Mrs. H. Melvin Roberts	Cleveland, Ohio
Mrs. Lon Hocker, Jr.	St. Louis, Missouri

MEN'S GOLF COMMITTEE

Mr. Lowell White, <i>Chairman</i>	Denver, Colorado
Mr. F. H. Durham	Minneapolis, Minnesota
Mr. Pat H. Eager, Jr.	Jackson, Mississippi
Mr. George M. Weichelt	Chicago, Illinois
Mr. Alvin R. Christovich	New Orleans, Louisiana

LADIES' GOLF COMMITTEE

Mrs. Lester P. Dodd, <i>Chairman</i>	Detroit, Michigan
Mrs. James T. Blair, Jr.	Jefferson City, Missouri
Mrs. Irvin E. Kerr	Detroit, Michigan

LADIES' BRIDGE COMMITTEE

Mrs. Robert W. Shackelford, <i>Chairman</i>	Tampa, Florida
Mrs. Milo H. Crawford	Birmingham, Michigan
Mrs. Walter R. Mayne	St. Louis, Missouri

GET ACQUAINTED COMMITTEE

Mr. Milo H. Crawford, <i>Chairman</i>	Birmingham, Michigan
Mr. P. E. Reeder	Kansas City, Missouri
Mr. Marion N. Chrestman	Dallas, Texas
Mr. J. Roy Dickie	Pittsburgh, Pennsylvania
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Mr. Melvin M. Roberts	Cleveland, Ohio
Mr. Rex H. Fowler	Des Moines, Iowa
Mr. Albert W. Schlipf	Springfield, Illinois
Mr. C. F. Merrell	Indianapolis, Indiana
Mr. Lionel P. Kristeller	Newark, New Jersey
Mr. F. G. Warren	Sioux Falls, South Dakota
Mr. Payne Karr	Seattle, Washington
Mr. Forrest A. Betts	Los Angeles, California
Mr. Robert P. Hobson	Louisville, Kentucky

Insurance Counsel Journal

PUBLISHED QUARTERLY BY
INTERNATIONAL ASSOCIATION OF
INSURANCE COUNSEL

GEORGE W. YANCEY, *Editor and Manager*
MASSEY BUILDING,
BIRMINGHAM, ALABAMA.

The Journal welcomes contributions from members and friends, and publishes as many as space will permit. The articles published represent the opinions of the contributors only. Where Committee Reports have received official approval of the Executive Committee it will be so noted.

Subscription price to members \$2.00 a year. To individuals not members \$4.00 a year. Single copy \$1.00.

Entered as Second Class Mail Matter at
the Post Office at Birmingham, Alabama

VOL. VII JULY, 1940 No. 3

ANNUAL MEETING OF ASSOCIATION WHITE SULPHUR SPRINGS, WEST VIRGINIA, SEPTEMBER 4, 5 AND 6, 1940

Your Executive Committee was indeed fortunate in securing September 4, 5 and 6 for our annual meeting at White Sulphur. The weather should be ideal for golf and all forms of outdoor sports and recreation, to say nothing of the indoor features of entertainment which Bill Reeder, Chairman of the Entertainment Committee, and his able assistants will provide for the enjoyment and entertainment of the members. President Hayes has arranged an instructive and interesting program. Plan now to spend at least a part of your summer vacation at White Sulphur and make your reservation with the Greenbrier Hotel, White Sulphur, without delay and thereby secure the type room or rooms which you desire.

* * *

SUMMARY, ANNUAL MEETING, IN- TERNATIONAL ASSOCIATION OF INSURANCE COUNSEL, GREEN- BRIER HOTEL, WHITE SUL- PHUR SPRINGS, WEST VA.

Date of Meeting: September 4th, 5th and 6th 1940.

Rates hereafter quoted will be in effect

from September 1 to September 9, 1940, inclusive. If a limited number of convention attendants desire to remain a reasonable time longer than September 9, there will be no increase in the rates.

The rates will be \$9.00 per day per person, American Plan, where two people occupy a double room, having twin beds and bath, or for two single rooms with bath between, each room being equipped with its own lavatory and toilet. The rate will be \$10.00 per day per person, American Plan, for a single room with private bath. Cottage accommodations will be \$9.00 per day per person, American Plan.

The foregoing rates include the privilege of luncheon at the Golf and Tennis Club in preference to the hotel if so desired.

Golf Greens Fees will be \$2.00 per day per person, but will entitle convention attendants to a locker in the club house.

Swimming pool charges will be \$.50 per swim; admission to moving picture showings will be \$.50 per person. Tennis courts may be rented for \$.50 per hour, and the rate for Skeet will be \$1.50 per round.

Dinner each evening will be augmented by music, and there will be dancing each evening.

Convention members and guests who so desire may have bedrooms connected with parlors for which an additional charge of \$6.00 per day will be made.

* * *

IMMINENTLY DANGEROUS

The manufacturer of a washing machine was held liable for an injury proximately caused by a latent defect in the machine which made the machine imminently dangerous when used for the purpose for which it was manufactured and which was known or should have been known to be dangerous by the manufacturer by the exercise of reasonable care. *Altorfer Brothers Company v. Green*, 183 So. 415 (1938). The manufacturer of an automobile has been held liable to the purchaser of a defective automobile, which at time of delivery, the manufacturer

knew or should have known by the exercise of reasonable care to be imminently dangerous. *Miles v. Chrysler Corporation*, 191 So. 245 (1939).

A vendor of a refrigerator was held liable to purchaser under the doctrine of imminently dangerous in a case where the refrigerator at the time of the sale was in a defective condition and vendor undertook to adjust repair or restore same. *Sterchi Brothers Stores, Inc. v. Castleberry*. In this case the court cited a great many cases throughout the United States.

In landlord and tenant cases it has been held in order for plaintiff to recover for a latent defect that he must show: (1) that the defect causing the injury was latent; (2) that it existed at the time of renting premises; (3) that it was known to the defendant (the landlord) at the time of the letting; (4) that it was not obvious or concealed by the defendant from the tenant. Further, that if the defect was patent no recovery should be had in tort. *Jones v. Tenn. Land Company*, 173 So. 233; *Smith v. Hallock*, 98 So. 781; *Anderson v. Robertson*, 62 So. 512, and many other cases.

Should the doctrine of imminently dangerous heretofore applied to manufacturers be broadened and extended to the relationship of landlord and tenant?

A circuit judge in Birmingham has recently held in a suit of tenant against landlord, that landlord is liable for a latent defect in a fixture alleged to be a part of the realty which was imminently dangerous and defective at the time of the letting, if the landlord knew or should have known by the exercise of reasonable care of latent defect. The court held the complaint subject to demurrer prior to amendment which added the magic words "imminently dangerous." Apparently all that is necessary to change the doctrine of liability of landlord to tenant is to aver that the premises were imminently dangerous. It will be interesting to know just how far the courts will extend the doctrine—imminently dangerous.

PRE-TRIAL VALUE OF A CASUALTY CASE

Prior to trial date we obtain the best settlement offer from plaintiff's attorney, review file of investigation, re-interview witnesses, take into consideration the personality of plaintiff and plaintiff's witnesses, personality of defendant and defendant's witnesses, the possibility of surprise testimony, the ability and skill of plaintiff's attorney and whether or not the defendant is a large corporation or an individual, the type of jury which will probably be selected to try the case and their natural reaction for or against client on the facts as they then appear. We, thereupon, advise our client of the best settlement offer obtainable and recommend whether or not the case be settled or tried.

I venture the assertion that regardless of the skill, ability and wide trial experience of the defense lawyer he cannot predict with any degree of accuracy the amount of the jury verdict or whether or not the verdict will be in favor of the plaintiff or defendant. The best that he can do is to base his opinion on his experience, the law of averages and the many factors and circumstances entering into the trial of a jury case.

Illustrative of the problem, I will cite a case:

Two women sued for personal injuries and their husbands sued for loss of services and expenses, the cases being tried together. The jury gave husbands small verdicts but found against injured women.

I have written the above not because I feel that I have any peculiar ability to value a casualty case for settlement purposes, but because I feel that a discussion of the subject by trial lawyers and home office counsel through the medium of the Journal would be read with interest and profit by the members of the Association.

Report of the Home Office Counsel Committee

THE Home Office Counsel Committee was first appointed in 1937 to act in an advisory capacity for the officers, committees and members of the Association. It is the view of the committee that, while suggestions to the Executive Committee are in order, it should undertake no extended study or report unless requested to do so.

During the past year the committee has received no requests for advice. Perhaps this is due to a lack of important problems or it may be that the committee and membership have not been impressed with the possibility of securing assistance from home office counsel.

The present committee feels that a Home Office Counsel Committee should be continued and suggests that its usefulness might be increased. It submits the following for consideration:

1. Could the committee be of more assistance to the state membership committees? In some of the smaller towns it may be difficult for the membership committee to determine what lawyers are eligible for membership. The committee has obtained applications for membership from several home office counsel this year. It is in an excellent position to secure such memberships and should continue this activity.

2. Could the committee be more helpful to home office representatives of the member companies by an exchange of views on com-

mon problems? Perhaps it is not realized that the Home Office Counsel Committee can perform a useful function in this regard.

3. Could the committee be a clearing house for suggestions by practicing members of how home office counsel could be more helpful to their lawyers? A member may particularly appreciate a method used by one company and not feel justified in suggesting that it be used by others. Worth-while suggestions could be passed on to the Association by a report of this committee.

4. The Executive Committee might request this committee to study and report on a specific subject that would be of interest to all members. It has been suggested that a subject might be one such as "promoting good will with the insured and the public."

It is suggested by this committee that the Executive Committee consider publishing in the Journal an index of papers on insurance law subjects and law review articles. Many times it is very difficult to locate papers and articles dealing with insurance law subjects.

J. M. SWEITZER, *Chairman*
RAYMOND N. CAVERLY
HUGH D. COMBS
PATRICK F. BURKE
JOHN A. LUHN
VICTOR C. GORTON
GEORGE L. NAUGHT
BERKELEY COX

Report of the Committee on the Unauthorized Practice of Law

To: The President and members of the International Association of Insurance Counsel:

Your Committee on Unauthorized Practice of Law has held no formal meeting during the year, but has kept closely in touch with the activities which have been going on in the adjusters field and particularly with the Conference Committee on Adjusters, which has perfected an active, energetic and continuing organization to deal with its problems.

A brief statement as to the activities of the Conference Committee could probably best serve as a report of this Committee.

The Conference Committee on Adjusters has continued its activities of advocating the

settlement of any controversies between laymen and lawyers as to the proper activities of each in the field of adjusting of claims by urging that much more good can be accomplished by conference and conciliation than by legislation or litigation.

Subsequent to the January meeting of the Committee held in Chicago, it printed a circular setting forth the statement of principles which it had previously adopted and caused this to be mailed with a letter inviting complaints or criticisms and requesting the reference to it of any matters in controversy effecting local communities. The response of this was very favorable. Of the complaints which have been received by the Con-

ference Committee from different localities, since its organization, the Committee's record is an impressive one. 100% of those disposed of being disposed of to the mutual satisfaction of both parties and with but one complaint still pending undetermined.

The results in litigation in various states during the past year have indicated the wisdom of the Conference Committee's method of operation. The Alabama litigation against various insurance companies and adjusters has again become stale-mated without relief to either party. The Wisconsin matter which was the complaint of a junior bar association against a lay adjuster is still dragging its way through the Courts.

The activities of the California State Bar Association Committee which sought the advice of the Conference Committee in the summer of 1939 is now being directed along the

lines of activity suggested by the National Conference Committee.

While there seems to be no active work which profitably may be done by a Committee upon Unauthorized Practice of Law of this association, your Committee recommends that such a Committee be continued with the immediate objective of individually recommending that such matters in the lay adjusters' field as may become acute be referred to the National Conference Committee.

Respectfully submitted,

OSCAR J. BROWN, *Chairman*
WILSON C. JAINSEN
C. H. GOVER
JAMES T. BLAIR, JR.
MARK TOWNSEND, JR.
H. J. SCHROEDER
JEWELL ALEXANDER

Report of Committee on Casualty Insurance

WE regret that it has not been possible to have the report of the Casualty Committee available for publication in the July issue of the Journal. However, we expect to have it completed before the meeting in September and to present it at that time.

The committee is making a study of all the cases dealing with the subject of "Liability of an Insurer beyond the Limits of its Policy." The report will present:

- (1) An analysis of all the cases by states, and
- (2) A suggestion of the steps which, it appears from such analysis, an insurer can best take to protect its rights
 - (a) Before judgment, and
 - (b) After judgment.

The committee has found it impossible to include in the forthcoming report the court procedure which should be followed when the judgment exceeds the coverage. However, it is hoped that the subject is of sufficient importance that a future committee may deem it advisable to explore and develop the latter and very interesting field. This will include a study both of the cases and of the statutes of all the states with reference to appeal, superseding of judgments and garnishment of an insurer.

F. B. BAYLOR, *Chairman*
FRED S. BALL, JR.
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FLETCHER B. COLEMAN
IRVIN E. KERR

Statement by Committee on Compulsory Automobile Insurance and Financial Responsibility Legislation

It has been impossible for the Committee to complete its report in time for it to be printed in this issue of the Journal. The report will be completed and available for distribution prior to the coming Convention.

FORREST S. SMITH, *Chairman*,
ELIAS FIELD
WILLIAM H. FREEMAN

OLIVER R. BECKWITH
JOHN L. BARTON
FRANCIS M. HOLT
HOWARD D. BROWN
ROYCE G. ROWE
HERBERT W. J. HARGRAVE
WILSON C. JAINSEN, *ex officio*

Report of the Committee on Fire and Marine Insurance

YOUR Committee on Fire and Marine Insurance begs to report that it has canvassed the work of this Committee for five years last past, as well as the conditions now prevailing with respect to this subject matter, and finds little to suggest or recommend.

It has been suggested that if the new Rules of Civil Procedure are to be strictly followed, as to the meaning of real parties in interest as plaintiffs, there will be a conflict with substantive rights which parties have heretofore been able to exercise, by use of borrowed and loaned receipts, under *Luckenbach Steamship Company v. McCahan Sugar Company*, 248 U. S. 139; that this question is one of great importance presently and will continue so until finally determined. In view of its importance, the subject merits a special study of existing decisions, the Uniform Bill of Lading Act, and the new rules, and presentation in the form of a discussion or address.

There have been no important or outstanding decisions involving this subject matter, during the past year. Your Committee concludes its report by directing attention to the following cases:

Group Health Ass'n v. Moor, 24 Fed. Supp. 445.

State ex rel. Vars v. Knott, 184 So. 752.

Polleck v. Home Ins. Co. of N. Y., 121 N. J. L. 52, 1 Atl. (2d) 398.

Sandberg v. Dubuque Fire & Marine Ins. Co., 90 P. (2nd) 586 (Cal. App. 1939).

Export S. S. Corp. v. American Ins. Co. of Newark, 106 F. (2d) 9 (C. C. A. 2d).

Delametter v. Home Ins. Co., 126 S. W. (2d) 262, (Mo. App. 1939).

Sinram v. Pennsylvania R. Co., 61 F. (2d) 767, (C. C. A. 2nd 1939).

The Seatrain-Havana, 103 F. (2d) 772, (C. C. A. 2nd 1939).

Osborne v. Oglin, 8 U. S. Law Week 677 (April 22, 1940).

Boat Service Co. v. National Union Fire Ins. Co., 191 So. 707 (La. 1940).

CHARLES W. SELLERS, *Chairman*

THOMAS F. MOUNT

W. PERCY McDONALD

J. B. PATTERSON

CASSIUS E. GATES

Report of Fidelity and Surety Law Committee

THE Committee on Fidelity and Surety Law has been assigned no project nor work during the year and has not therefore any action of importance to report. It seems proper however for us to refer briefly to some cases of general interest decided during the year involving surety companies or pertaining to fidelity and surety law.

The case of *United States for Use and Benefit of Midland Loan Finance Co. v. National Surety Corporation*, et al., (60 S. Ct. Rep. 458; 84 L. ed. 459), was an action to recover the penalty of an official bond of the postmaster. The question presented was whether a private user of the mails may without the consent of the government maintain a suit on the official bond of the postmaster for consequential damages resulting from the misdelivery of mail. The Supreme Court of the United States, speaking through Mr. Justice Reed, ruled that Congress in requiring such bond had not intended "to let a private user of the mails, wronged by the principal of a postmaster's bond, sue where-

ever he might find defendants and gain for himself such priority on the bond as vigilance could obtain," but "that the Congress intended that claims on the bonds would be handled through the government rather than through various suits by individuals."

The case of *Osborn, et al v. Ozlin, et al.*, (60 S. Ct. Rep. 758), involved the constitutionality of the Virginia Resident Agents Law applicable alike to agents of surety companies and insurance companies. The Supreme Court of the United States, speaking through Mr. Justice Frankfurter, sustained the constitutionality of the Virginia Act after observing that "government has always had a special relation to insurance" and, pointing out many various instances governing control and regulation of insurance, the court ruled that Virginia in the enactment of the Act "has exerted its powers as to matters within the bounds of her control" and therefore that the Act was constitutional.

The Miller Act (40 U. S. C. A. Sections 270a, 270b, 270c and 270d) passed by Con-

gress in 1935, requiring among other things a bond for the protection of persons supplying labor and material in the prosecution of public work, came before two Circuit Courts of Appeal for construction. The Second Circuit Court of Appeals in the case of *United States for Use and Benefit of Hallenbeck v. Fleisher Engineering & Construction Co., et al.*, (107 Fed. (2d) 925) ruled that even though the Act provided that notice of claim should be served by mailing by registered mail, a notice sent by ordinary mail and received by the contractor would satisfy the requirements of the statute. The Sixth Circuit Court of Appeals in the case of *United States ex rel Denie's Sons Company v. Bass*, decided on March 12, 1940 and not yet reported at the time of the preparation of this report, took a strict view of the requirements of the notice provision and held that mailing by registered mail was necessary. Certiorari was denied in the Hallenbeck case

(60 S. Ct. Rep. 715; 84 L. ed. 644); we are informed that a petition for writ of certiorari is being filed in the United States Supreme Court in the Denie's Sons Company case in the hope that the Supreme Court will take the case over and resolve the conflicting constructions of the statute by the different Circuit Courts of Appeal.

While there have been several decisions of importance and interest by the highest courts of the several states dealing with fidelity and surety law it would unduly burden this report to discuss them herein.

Respectfully submitted,
CLARENCE F. MERRELL, *Chairman*
THOMAS L. JOHNSON
J. HARRY SCHISLER
LEO T. KISSAM
ALFRED C. KAMMER
LESTER P. DODD
A. B. KELLER
HENRY W. NICHOLS, *ex-officio*

Report of Committee on Life Insurance

IN submitting this report your Committee does so conscious of the fact that this field has been so ably and comprehensively covered in past years that selection of the subject matter presents obvious difficulties.

In its last report the Committee on Health and Accident Insurance made apology for the fact that it had to some extent encroached upon the field of this Committee. We find it necessary to make a return of that apology.

Your Committee feels that the trend of the decisions involving the construction of total and permanent disability provisions appearing in life insurance policies merits the consideration of all life and health insurance practitioners. In discussing this trend, which your Committee submits is distinctly unfavorable from the viewpoint of the companies, we will limit ourselves to that type of policy which provides for indemnity in the event of total and permanent disability which prevents the insured

disability. One, such as is quoted above, provides for benefits if the insured becomes so disabled as to be prevented from engaging in any occupation or performing any work for compensation or profit. This is commonly designated as a "total disability" provision. The other provides for indemnity if the insured is disabled from transacting duties pertaining to the particular occupation in which he is then engaged. This is commonly designated as an "occupational disability" provision. It is generally recognized that there is a fundamental difference between these two types of insurance and the risk that is in each case assumed by the insurer. However, despite this fundamental difference, there is a growing trend by many courts to convert the former type of coverage, which is distinctly more limited in its scope, into the latter type.

The reported cases passing upon what is a "total disability" within the meaning of the former type of coverage are so numerous that a complete listing thereof is prohibited.

There are two general lines of authority relating to cases construing "total disability" provisions. One tends to literalism and denies the insured recovery unless his disability prevents him from engaging in any occupation for remuneration or profit. Perhaps the

"from engaging in any occupation and performing any work for compensation or profit."

There are, of course, two general types of contracts in which provision is made for benefits in the event of total and permanent

most frequently cited case in this line of authority is *Hurley v. Bankers Life Ins. Co.*, 199 N. W. 343 (Iowa). Other more recent cases are *Buckner v. Jefferson Standard Life Ins. Co.*, 90 S. E. 897 (North Carolina); *Metropolitan Life Ins. Co. v. Foster*, 62 Fed. (2) 264; *Cooper v. Metropolitan Life Insurance Co.*, 177 Atl. 43 (Pa.); *Thigpen v. Jefferson Standard Life Insurance Co.*, 168 S. E. 845 (North Carolina); *New York Life Ins. Co. v. Stoner*, 109 Fed. (2) 874; *Metropolitan Life Ins. Co. v. Guinn*, 136 S. W. (2) 681 (Arkansas); *Bentley v. Protective Life Ins. Co.*, 194 So. 496 (Alabama); *Peters v. Mutual Life Ins. Co. of New York*, 26 Fed. Supp. 50; and *Frazee v. New York Life Ins. Co.*, 196 S. E. 556 (West Virginia). The other line of authority applies the principle of so-called "liberal construction" and permits the insured to recover if his disability prevents him from engaging in his regular occupation. It is with this last mentioned line of authority that we have to deal.

Perhaps the longest line of cases in which "total disability" insurance has been converted into "occupational" insurance is that found in Kentucky. The doctrine had its origin in that state in the case of *National Life & Accident Ins. Co. v. O'Brien, Ex'x.*, et al, 159 S. W. 1134, in which the court found the insurer liable if disability was such as to prevent the insured from prosecuting any kind of business "pertaining to his occupation" or to prevent him from doing all the substantial acts required of him in "his business." Thereafter, the courts of Kentucky have frequently applied what has been denominated the "liberal doctrine," holding the insurance company liable in cases where the plain and unambiguous language of the policy should have precluded recovery. Some of these cases follow.

In *Equitable Life Assurance Society of U. S. v. Merlock*, 69 S. W. (2) 12, a coal miner with heart trouble was found totally disabled because unable to engage in his occupation as a miner.

Mutual Life Ins. Co. of New York v. Beckmann, 87 S. W. (2) 602, wherein a banker, who had suffered a nervous breakdown, was found totally disabled although he was operating a beauty parlor business at the time of trial.

Aetna Life Ins. Co. v. Staggs, 75 S. W. (2) 214, wherein a coal miner, who suffered a hernia, was found totally disabled although

at the time of trial he was working as a switch flagman at reduced wages.

Ohio National Life Ins. Co. v. Stagner, 21 S. W. (2) 289, wherein a farmer, suffering from pellagra, was assisting his son in the trucking business at the time of trial.

Aetna Life Ins. Co. v. Castle, 67 S. W. (2) 17, wherein a miner, partially deaf and partially blind, was, according to the testimony of his own doctors, still able to do light work about the mine.

Also see *Travelers Ins. Co. v. Turner*, 39 S. W. (2) 216; *Aetna Life Ins. Co. v. Wells*, 72 S. W. (2) 33; *Prudential Ins. Co. v. Johnson*, 97 S. W. (2) 793.

The rationale of all of these decisions, and those from other jurisdictions holding to the same effect, is that the company, when the policy was written, *must have contemplated* that the inability of the insured, due to disability, to follow his then occupation would be tantamount to inability to engage in any occupation. It must be admitted that a strong argument is presented in those cases in which the insured is a laboring man who, when physically unable to perform any labor, cannot engage in other fields of endeavor because of educational limitations. However, the rule has not been so restricted and it has apparently made no difference that the insured could, and in many cases did, enter some occupation other than his regular one.

Such a case was *Equitable Life Assurance Society of U. S. v. McDonald*, 134 S. W. (2) 953, decided by the Kentucky court in 1939. There McDonald, who drove a gasoline truck, contracted tuberculosis and by reason thereof was unable to do the heavy work incident to his regular occupation. Treatment produced an arrested condition and the insured opened an automobile service station, which he was operating at the time of trial. Four helpers were employed at the station and the insured spent much of his time supervising, handling purchases and finances, and occasionally waiting on customers. *His earnings from this source exceeded his previous earnings as a truck driver.* Despite the policy provision requiring inability to follow any occupation, the court stated that the intent of the parties was to insure against

"***such physical impairment as disabled the insured from performing all material acts in the discharge of the usual and customary duties connected with his occupation or employment."

For those interested, a review of the Kentucky authorities and an analysis of the various theories of interpretation will be found in *Prudential Ins. Co. v. Harris*, 70 S. W. (2) 949. There the court reasons that as the Kentucky decisions had established the conversion from "total disability" to "occupational" insurance at the time the policy in question was issued, the contract must have been written with the understanding by both parties that it would be so interpreted. The court states:

"It is not merely the age of a rule nor the frequency of its application that gives stability, for error is not less error because it has perhaps become gray with the years or smooth with use. But, when contracts have been made under the authority of a consistent judicial course of construction, it should be a very compelling situation that would warrant a change which would adversely affect rights acquired under that policy."

Here the insurer had turned against its logic which it had itself tried to use, without success. In many of the cases excluding double indemnity for death by accidental means where the insured was "participating in aviation," counsel for the company vainly argued that the contract had been issued when virtually all the reported cases held that a passenger was "participating in aviation." The courts met this argument with the statement that the meaning of the words had changed, or that aviation had progressed into the commercial stage, and while one who in the early days flew as a passenger did "participate in aviation," this was no longer true. And so companies desiring to exclude the risk had to amend their policies.

In *Henderson v. Continental Casualty Co.*, 39 S. W. (2) 209 Kentucky, the insured, a brakeman, became unable to follow his usual occupation by reason of color blindness. *Except for this he was in good health*, capable of, and in fact, *performing work in other occupations* which did not require a color sense. The policy provided for both sickness and accident benefits. To recover benefits under the sickness provision the insured had to be disabled from performing "any and every duty pertaining to any business or occupation." To recover under the accident provision the insured had only to be disabled from performing "each and every duty per-

taining to his occupation." The insured sued for sickness benefits and one would therefore assume that his disability must prevent his engaging in any occupation. But the court held otherwise, stating:

"In the policy here involved, the appellee insured the appellant as a freight brakeman. Under our decisions, the clause of the policy here involved had a certain meaning in the law, and that was that the disability was total if the insured was unable to follow his usual occupation, although he might be able to do something else. Hence it follows that, as the appellant was unable to follow his occupation as a freight brakeman because of the disability to his eyes, he was totally disabled within the meaning of his policy."

Counsel for the company then pointed out that here, in one policy, the two types of coverage were expressly distinguished; that therefore the company could not have intended "occupational" insurance for sickness benefits, but only for accident benefits. In disposing of that contention the court stated:

"But as stated a fixed construction in law had been placed on the language used in the sickness indemnity part of the policy, and that construction made it mean just what the accident indemnity part literally says, which, being true, *there was no difference in law in the meaning of the two clauses*. There being no difference in meaning, there was no such conflict as to require a different construction to be placed upon them, although they both appeared in the same policy."

The doctrine of liberal construction has also found favor in Alabama, Arkansas, Georgia, Louisiana, Missouri, Nebraska, Ohio, South Carolina and Tennessee, though it must be admitted that the courts of these states have not advanced to the stage reached in Kentucky. Some of the reported cases follow.

Metropolitan Life Ins. Co. v. Blue, 133 So. 707 (Alabama), wherein the insured, a physician, became disabled from blood poisoning. Although the court denied recovery because it found the plaintiff able to engage in his own profession, approval was given to the liberal construction doctrine of "total disability," the court stating:

"'Prevented from engaging in any work or occupation,' as applied to this case, means prevented from doing substantial and profitable work in his profession."

To the same effect is *New York Life Ins. Co. v. Torrance*, 141 So. 547 (Alabama); *Aetna Life Ins. Co. v. Person*, 67 S. W. (2) 1007 (Arkansas); *New York Life Ins. Co. v. Oliver*, 165 S. E. 840 (Georgia); *Prudential Ins. Co. of America v. South*, 177 S. E. 499 (Georgia).

In the case last mentioned the court stated:

"The words 'occupation' and 'work' must each be construed according to the facts and circumstances of the execution of the contract, including the objects to be effectuated thereby. *The insured was at the time employed as a switchman, and the company must have known of this fact.*"

This raises an interesting question for speculation. If the company is to be held to insure the plaintiff's occupation as of the time the policy is written, what solution will be offered when the insured gives up the occupation in which he was engaged at that time and successively follows several different occupations? Suppose when the policy was written the insured was a brakeman, later a truck driver, then a salesman, and finally an aviator, which last mentioned occupation he was engaged in at the onset of disability. Under the reasoning of the South case the company "knew he was a brakeman" at the time the policy was issued, and the policy must be construed "according to the facts and circumstances of the execution of the contract." But suppose the insured, while disabled from being an aviator, can still follow the occupation of brakeman, truck driver, or salesman? Will he still be held disabled from engaging in any occupation for compensation or profit?

The probable answer of the Georgia court is indicated in *Marchant v. New York Life Ins. Co.*, 155 S. E. 221 (Georgia). In that case the insured, before injury, was simultaneously engaged in

- (1) farming
- (2) sawmilling
- (3) selling hogs and cattle
- (4) buying and selling cotton seed and fertilizer as employee of another.

The insured was 40 years old. His alleged disability resulted from a dislocated head of the femur. Following the injury he was able to get about with a cane and did some selling. His doctor testified:

"He can still do a lot of things. He can still ride in an automobile, take orders, and sell fertilizers for a profit; he can do it cheap enough."

The court solved the question of this four-fold employment by stating:

"With regard to the instant policies, the four lines of business should be treated as a unit of employment and the insured should be considered as totally disabled within the meaning of the policies if forced by his condition to desist from substantially all of the usual and customary duties of such employment."

It thus made no difference that the insured could still sell, and was in fact selling, fertilizers at a profit. He was "totally disabled" if unable to do substantially all of the usual and customary duties of the so-called "unit of employment."

Other decisions converting "total disability" into "occupational coverage" will be found in *Crowe v. Equitable Life Assurance Society of U. S.*, 154 So. 52 (Louisiana); *Link v. New York Life Ins. Co.*, 194 So. 118 (Louisiana); *Kane v. Metropolitan Life Ins. Co.*, 73 S. W. (2) 826 (Missouri); *Hamblin v. Equitable Life Assurance Society of U. S.*, 248 N. W. 397 (Nebraska); *Oswald v. Equitable Assurance Society of U. S.*, 258 N. W. 41 (Nebraska); and *Pacific Mutual Life Ins. Co. v. McCrary*, 32 S. W. (2) 1053 (Tennessee).

The decision in *McCutchin v. Pacific Mutual Life Ins. Co.*, 151 S. E. 67 (South Carolina), is also questionable. In that case the insured, who was a college graduate, had successively followed the occupations of banker, farmer, and general supply business. He was engaged in the occupation last named when he became deaf. The court permitted recovery, although it is difficult to see why the insured could not have returned to farming as an occupation and thus prevented total disability.

Although the Pennsylvania courts have heretofore rejected the "occupational" theory, the decision in the recent case of *Sebastianelli*

v. Prudential Ins. Co. of America, 12 Atl. (2) 113 (Pennsylvania 1940), might prove the forerunner of the doctrine in that state. The insured, a miner, sustained injuries which prevented him from following that occupation. The jury, in answer to a special interrogatory, found plaintiff "could do other forms of occupation," but did not specify the occupations plaintiff could perform. The general verdict in plaintiff's favor was attacked as being inconsistent with the special finding, but the court permitted recovery, stating:

"But as plaintiff's claim would not be defeated merely because he might be able to perform *some* kinds of occupation, and as the jury did not specify the 'forms' of occupation they had in mind, the general verdict and special finding are not clearly inconsistent with one another."

Ohio may now be said to have joined the ranks of the "occupational theory" jurisdictions. Previous decisions in that state have been more or less split, with a slight balance in favor of the theory of "literal" construction. The "literal" construction doctrine seemed to be gaining ground with the decision in *Mosher v. Equitable Life Assurance Society of U. S.*, 14 N. E. (2) 413, decided by an intermediate court in 1936. In that case the insured, a farmer, was claiming disability because of the loss of an arm. The court refused to limit proof of total disability so as to show whether the insured could engage in the occupation in which he was engaged before the injury. The court also held it was error not to charge that the loss of an arm, unattended by any other circumstances, would not entitle the plaintiff to recover, "as it is common knowledge that one armed men are daily performing gainful labor."

The gain made by this decision, however, was more than offset by the decision of the Ohio Supreme Court in *Gibbons v. Metropolitan Life Ins. Co.*, 21 N. E. (2) 588 (1939). In the last named case the insured worked as a superintendent in a steel mill. He was stricken with ulcers and suffered a hemorrhage. Medical witnesses testified that the insured could engage in gainful employment. The court approved the trial court's charge defining total disability as:

"That he was completely unfitted and unable to perform the work *that he had*

been pursuing up to the time that he did become disabled, should you find by a greater weight of the evidence that he did so become disabled."

Although the facts in the Gibbons case do not make the result a particularly harsh one in that case, it is to be regretted that another court has placed its stamp of approval upon a charge which actually makes the issue one of occupational insurance.

In recent years several courts have had the problem of disposing of cases in which the insured was "holding" some sort of elective office at the time of trial, although the insured's condition was such that he unquestionably could not compete for employment in private industry. In *Duke v. Jefferson Standard Life Ins. Co.*, 174 S. E. 463 (South Carolina 1934), the insured, a farmer, also held the office of County Sheriff. Following disability he gave up farming, but continued as Sheriff. He was reelected to the office while still disabled, but claimed that his family helped him with his duties. The court permitted him to recover, holding his "regular occupation" was farming, which he was unable to follow.

In *Bennett v. Metropolitan Life Ins. Co.*, 287 N. W. 609 (Nebraska 1939), the insured, a barber, was unable to continue his trade, but as a result of friendship he secured temporary employment, at which he earned approximately one-half his former wages. The tenure of his employment depended upon the indulgence of a friendly employer. The court permitted recovery because the insured was

"unable to do all the substantial and material acts necessary to the prosecution of the insured's business or occupation in his customary manner."

In *Columbia Mutual Life Ins. Co. v. Craft*, 185 So. 225 (Miss. 1938), the insured became a helpless cripple. He was thereafter elected Circuit Clerk and was able to perform the duties of that office by the hands of employed help. The policy provided for indemnity in the event the insured was prevented from

"directing any gainful labor."

In passing on this provision the court stated:

"Any man that knows how to do any given piece of work, or how to conduct any particular business, can direct others how to do it, unless he is insane or is in a coma ***."

and

*** it becomes necessary to interpret them (policy provisions) as having application only to an insured whose *usual* and *ordinary* occupation is that of directing others in the performance of their duties, and not to an insured who, in the conduct of his business or occupation, usually or ordinarily does the work or a substantial portion of it himself."

This reasoning is difficult to accept in view of the facts present in the case. The question was not the insured's *ability* to direct gainful labor, because he was in fact doing that very thing. A different question would have been presented if the insured had not been doing any directing, and had the question of his ability to direct been the issue presented. In that event the decision could be justified.

In *Wood v. Central States Life Ins. Co.*, 271 N. W. 850 (Nebraska 1937), a pharmacist became disabled from following his occupation. He was elected and reelected to the office of County Treasurer for four year terms. The court held:

*** We do not think that an office such as that of Circuit Clerk was in the mind of the parties at the time of the contract, or under the facts in this case, that it comes within the term 'gainful occupation.' It has no degree of permanence, and in this particular case appears to be, so far as the appellee is concerned, a sinecure bestowed upon him perhaps because of his infirmities by an indulgent people."

To the same effect see *Mutual Life Ins. Co. of New York v. Marsh*, 56 S. W. (2) 433 (Arkansas).

We do not feel that these last mentioned decisions are particularly repugnant to the theory of "literal" construction. If the question is one of the insured's *ability* to engage in a gainful occupation, he should not be penalized if through charity, or its equivalent, he is placed in a position to earn a living,

though physically unable to discharge the duties of his office.

The danger lies in the other class of cases mentioned wherein "total disability" coverage has been converted by a process of judicial legislation into "occupational" coverage.

The unjust results reached by courts following the "liberal" construction theory may be noted above. The classic example, of course, is the decision of the Kentucky court in *Henderson v. Continental Casualty Co.*, supra. If an insured who becomes color blind, and though otherwise physically fit and able, is judicially determined to be totally disabled from following *any* occupation for remuneration or profit (despite the fact a gainful employment is actually being followed) because unable to follow his "regular occupation," what result may be anticipated in the case of a concert violinist or court reporter who is unable to play or write because of the loss or stiffening of one finger? If unable to play to concert audiences or take court reporting, is he to be adjudged totally disabled because of inability to engage in his "regular" occupation?

And if the measure of the insurer's liability under this theory of construction is to be determined by the occupation of the insured at the time of execution of the policy, what is to be done in the case of an insured whose occupation is that of "student" when the policy is issued? Certainly it is not within the contemplation of the parties that he will remain a student during the life of the policy.

It is elementary that in the interpretation and enforcement of written instruments courts have power, in the event of ambiguity, to construe such instruments and resolve all questions of doubt in favor of the insured. But the type of contract here involved is not ambiguous in any respect, and the result of the application of the "liberal" construction theory is to nullify and destroy the solemn contract of the litigants and to substitute therefor the court's own idea of the contract the parties *should* have entered.

The result imposes upon the companies a burden not intended to be assumed, and gives to the insured a wholly unexpected advantage. All contracts are classified according to the hazard assumed and the premiums are determined on that basis. Insurance against "total disability" which will prevent the insured from following "any occupation" is of course a much more limited type of cov-

erage than that which insures against inability to follow one's "regular occupation." It is clear that the risk of an insured remaining for any length of time totally unable to follow "any" business is far less than the risk of his remaining totally unable to follow his "regular" occupation.

There ought to be a place in our scheme of life for insurance of this type, and it is certainly important to the well being of many families that the bread winner be so protected. However, the tendency of the courts has been to convert these policies into so-called "occupational" policies, or into partial disability contracts.

It is clear that the companies did not anticipate when they started writing this form of insurance that it would insure the following of an occupation. Therefore, for self-protection many of the companies have been compelled to drop completely the writing of disability insurance, and those companies

which have continued this form of insurance have been compelled to greatly increase the premium rate to the insured's disadvantage.

Your Committee believes that the trend of converting "total" into "occupational" disability insurance, though by no means as yet a universal one, is reaching dangerous limits. What can be done to halt it before it spreads further presents a difficult problem. Some states are already definitely lost to the "occupational" theorists. We believe that the best line of defense lies in demonstrating the unjust results already reached and the more unjust ones which may be anticipated in those states.

Respectfully submitted,
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Report of Committee on Workmen's Compensation

THE introductory statement in a pamphlet of the United States Department of Labor, Serial No. R. 1090, entitled "Principal Features of Workmen's Compensation Laws, as of January 1, 1940" is as follows:

"At the beginning of 1940 all of the States except two (Arkansas and Mississippi) had compensation laws in effect. In addition, such laws are operative for the benefit of employees in the District of Columbia, Puerto Rico, Alaska, Hawaii, and in the Philippines, and for civil employees of the Federal Government, and for longshoremen and harbor workers. As a result, there are now in operation in the United States no less than 53 independent compensation laws which have been drafted and put into effect, over a period of some 30 years. All agree in their main objective, which is the payment of benefits to injured employees or to the dependents of those killed in industry, without regard to the question of negligence. But similarity almost ends here, for the application of the principle presents a great diversity of details in the various laws."

In considering the subject for report of your Committee it is obvious that many in-

teresting decisions under various of these laws are not of general interest because of the individual variance in their provisions. This is particularly true on all matters of procedure and practice.

The subject of occupational disease has been more than covered in recent years in various reports and publications. Last year's committee reported on the subject of extra territorial application of these various laws. On account of the extreme difficulty in finding a particular phase common in all of these acts, it was felt that this year's report might be of interest if it were to comment on some of the decisions in courts of last resort over the period from April 1, 1938 to April 1, 1940 which did not relate particularly to procedure or unusual provisions of any particular act, but which might tend to show the general trend throughout the country, of judicial interpretation and construction of these various acts.

Important trends of recent decisions are the continued "liberalization" or disregard of rules of evidence at common law, the tendency to extend the benefits of compensation acts through strained factual findings and legal interpretations, and the continued approval by appellate courts of liability in more than one State under the extra territorial

feature of the various laws. If one were to pick the outstanding abuse in these laws about which there should be a reasonable hope of remedy it is the unjust payment of double compensation in these situations. It is probably too much to hope that the various legislative bodies of the various jurisdictions could ever be convinced as to the advisability of adopting a uniform Workmen's Compensation Law. It should not be too much to hope and expect that a proper movement might bring about uniform provisions as to extra territorial effect so that double compensation would not be paid in these cases.

Constitutionality

The Pennsylvania court held, in *Rich Hill Coal Co., v. Bashore*, 7 Atl. (2) 302, that a provision authorizing a lay member of a labor union to represent compensation claimants in litigating claims is invalid. It also held invalid a provision that an injury to an employee in the course of his employment was presumed to have been caused by the employer's negligence and was unconstitutional under the due process of law provision; also that a provision that an employee's declaration made within twelve hours after his injury was admissible as competent evidence was invalid as violating the principle that rules of evidence must be uniform and impartial and the constitutional requirements that rules of evidence cannot be regulated by local or special law and as violative of the requirement of equal protection of the laws. The decision in this case is extremely long and discusses many constitutional questions.

Accidents

The Missouri court upheld an award for allergic bronchial asthma as an accident. *Bogt v. Ford Motor Co.*, 138 S. W. (2d) 684.

A death in a mine by heart disease in a relatively short time after a fall of rock and following heavy muscular work, was held to be a compensable accident on the ground that the work was a material factor in bringing on the heart attack. *Bergnana v. Department of Labor & Industries*, 91 Pac. (2d) 551 (Wash.).

Evidence of twenty-three hours continuous mental effort by a timekeeper in an attempt to find an error in his books constituted overexertion, which was directly and causally connected with his death, as a result of cerebral hemorrhage, was held to warrant an

award of compensation in *Monahan v. Seeds and Durham*, 3 Atl. (2d) 998, (Pa.).

Occupational Disease Cases

Recovery was allowed for lead poisoning caused by using tetra ethyl gasoline in a blow torch as an accidental injury in *Black v. Creston Auto Co.*, 281 N. W. 189 (Ia.).

The Michigan court has reaffirmed its stand against the maintenance of common law actions on account of industrial disease. *Thomas v. Parker Rustproof Co.*, 279 N. W. 504 (silicosis); *Piskornik v. Hudson Motor Car Co.*, 280 N. W. 25 (lead poisoning).

Under the North Carolina act a plaintiff whose "health became seriously and permanently impaired because of unhealthy working conditions in defendant's plant, conditions which were known and could have been prevented by proper care and of which plaintiff was not warned," was held not entitled to common law damages on the ground that the compensation act was a sole remedy. *Jenkins v. American Enca Corp.*, 95 Fed. (2d) 755.

A malignant cancer developing under a workman's tongue from sulphuric acid fumes in a storage battery plant was held to be properly classified as an occupational disease in *Boal v. Elec. Stor. Battery Co.*, 98 Fed. (2d) 815, (Pa. Act), and in *Grain Handling Co. v. Sweeney*, 102 Fed. (2d) 464, (Longshoremen's Act), tuberculosis resulting from a constitutional susceptibility aggravated by grain dust was held compensable because of a hazard greater than that encountered in normal life.

Rulings on Evidence

In the field of evidence we find that hearsay evidence may be received with great caution in compensation proceedings, *Spence v. Bethlehem Steel Co.*, 197 Atl. 302 (Md.); that rights under the act cannot be determined by hearsay evidence, *McCoy v. General Glass Corp.*, 17 N. E. (2d) 473 (Ind.), and that hearsay alone is sufficient to sustain an award, *Sada v. Industrial Comm.*, 78 Pac. (2d) 1127.

Under the District of Columbia act, declarations of a deceased employee concerning the injuries are to be received and, if corroborated, will be sufficient to establish the injury. 33 U. S. C. A. 923 (a). The U. S. Court of Appeals for the District of Columbia in *Associated Gen. Contractors of America, Inc. v. Cardillo*, 106 Fed. (2d) 327,

upheld, under that statute, an award in a death case on the widow's testimony that the deceased told her that he struck his head on a filing cabinet, that she saw the gash with dried blood and that he complained of certain other symptoms, holding that his declarations were thus corroborated by other evidence sufficient to establish the injury.

In *Harring v. Glen Alden Coal Co.*, 198 Atl. 508, (Pa.), testimony of deceased's wife in a death case that on the day following injury she called the physician's attention to a mark on deceased and described to the physician its size on the preceding day, was held admissible. However, in *Nazarey v. The Lehigh Valley Coal Co.*, 198 Atl. 899, the Pennsylvania court held it improper to cross-examine a pathologist who had been called by claimant solely to prove facts witnessed on a post mortem examination as to the cause of death. Two months later in *Aurand v. Universal Carloading and Distributing Co.*, 200 Atl. 285, the court held that rules of evidence are not applicable in compensation proceedings with the same rigor as in litigation before a jury and that it would not, for technical reasons, classify borderline evidence as incompetent. Still later in *Dosen v. Union Collieries Co.*, 8 Atl. (2d) 442, it held that the high degree of proof essential in other cases to set aside a written statement is not demanded in a compensation case as a basis for setting aside a final receipt.

The New York Court of Appeals holds that an employer's report of accident is not without probative force merely because it is not made on personal knowledge in *Bollard v. Engel*, 17 N. E. (2d) 130. In Ohio the exclusion of self-serving statements made by a deceased employee concerning his injuries to various persons, including his physician, was held proper, *Gillen v. Ind. Comm.*, 17 N. E. (2d) 663. Evidence showing that deceased was a conscientious employee not known to have left his job for personal reasons, was held to support an award in a death case in *Hooper v. The Great American Indemnity Co.*, 102 Fed. (2d) 739, (Texas Act), where he was found killed by a street car outside of the enclosure of the Fair Grounds where he was supposed to be working.

Disability and its Computation

On the subject of disability we find the Massachusetts court, *Atkins v. C. A. Hack & Sons*, 20 N. E. (2d) 453, holding that the

fact that the injured employee received less in wages after returning to work on account of business depression would not warrant awarding compensation, in the absence of a specific injury for which the Act provides compensation.

In Texas, *Texas Emp. Ins. Ass'n. v. Thrash*, 136 S. W. (2d) 905, it was held that capacity to labor is no element in specific schedule injury cases and recovery is limited to the schedule even if the capacity to labor has been totally and permanently destroyed. Where all the medical testimony indicated no disability, the testimony of the employee himself as to his own condition and that he was unable to work, was held sufficient to sustain a finding of some disability but insufficient to sustain the board's finding of total disability in *James v. Elkhorn Piney Coal M. Co.*, 127 S. W. (2d) 823, (Ky.), and in *Black Mountain Corp. v. Adkins*, 133 S. W. (2d) 900, the Kentucky Court upheld an award of 33 1/3% of total disability on account of an injury to a leg, although the specific injury table called for a lesser amount. Evidence showing that a leg injury prevented the man from doing any work requiring him to stand, walk or sit, entitled him to permanent total disability. *Thomas v. Ind. Comm.*, 79 Pac. (2d) 1, (Utah).

Evidence that claimant was injured in an employment of different character from that in which he had been engaged at the time of a previous injury, for which he received total disability compensation, was held to warrant another award for total disability by the Michigan court in *Hebert v. Ford Motor Car Co.*, 281 N. W. 374.

The Nebraska Court has held that facial disfigurement is compensable although not specifically covered by the Act. The claimant was a salesman. *Wilson v. Brown-McDonald*, 278 N. W. 254.

Retention of the same wage basis at a different employment following a compensable injury has been held not the test for determining compensation in *Luckenbach v. Norton*, 96 Fed. (2d) 764. A similar principle was adopted in *Twin Harbor Stevedoring & Tug Co. v. Marshall*, 103 Fed. (2d) 513. (Both Longshoremen's Act cases).

A back injury followed by an attempt to work and still later by a discharge, was held to present a case in which the evidence supported an award where "there was work as a trucker which he could do and was willing to do" but where "unfortunately there was

no work of this kind to be done." *Southern Steamship Co. v. Norton*, 101 Fed. (2d) 825. (Longshoremen's Act).

Wage Computation

On the subject of wage, tips of a restaurant waitress are held to be part of her recompense under a contract of hire rather than mere gratuities. *Coates v. Warren Hotel*, 11 Atl. (2d) 436, (N. J.).

The wage rate on a WPA project where the injured had obtained employment after a period of total disability, was held not a sufficient basis for the measurement of earning power by the Pennsylvania court in *Battalene v. State Work Relief Comp. Fund*, 200 Atl. 198, (Pa.).

"Arising Out of" the Employment

On that fruitful source of litigation, the question as to when an injury arises out of the employment, we find the following decisions of interest:

A country club caddy injured in falling from an apple tree which he had climbed to pick apples at the direction of the golf instructor, was held to have sustained accidental injury "arising out of and in the course of employment." *Bird v. Lake Hopatcong C. C.*, 197 Atl. 282, (N. J.).

A sales supervisor following attendance at a business banquet, parked the employer's automobile in front of the employer's premises, went to sleep and was drowned as a result of the automobile being pushed away from the driveway which it was obstructing and plunging into a canal. His death was held to "arise out of" and in the course of the employment. *Rafferty v. Dairymen's L. Co-op. Ass'n.*, 200 Atl. 493 (N. J.).

The Pennsylvania court, in *Weitz v. Weitz*, 7 Atl. (2d) 83, upheld a death award in the case of an employee who was directed by the employer to investigate and chase away a crowd outside of the store. He thereupon joined the crowd in chasing a suspected robber and was shot. A mill workman injured in attempting to extinguish a fire in his employer's mill in response to a telephone call, was held to be acting as an employee. *Shoaf v. Fitzpatrick*, 104 Fed. (2d) 290, (Tenn.).

Assault Cases

An award of compensation was upheld on account of injury through an assault by a helper. *Stulginski v. Waterbury R. M. Co.*, 199 Atl. 653 (Conn.). An award in favor

of the president of a furniture store on account of injuries when assaulted by a thief in the store, was upheld in *Dessler v. Reliable Furniture Co.*, 9 Atl. (2d) 865, (N. J.).

Compensation was upheld where a workman was killed by an assault of a fellow worker in *Southern Pacific Co. v. Sheppard*, 29 Fed. Supp. 376, (Longshoremen's Act), but denied where a workman was killed by a passing motorist while waiting for work to commence. *Gombert v. London Guarantee & A. Co.*, 100 Fed. (2d) 352, (Texas).

The Virginia court held that a workman, if he could show connection between employment and injury, could recover compensation on account of being shot by a picket on his way to work on Sunday, but recovery was denied because no causal connection had been, in fact, shown. *A. W. Campbell & Co. v. Messinger*, 199 S. E. 511.

Limitation of Amount of and Right to Recovery and Limitation as to Time

The limitations in the statute on claims for compensation were held to be no bar for a claim of medical and surgical expenses under the Longshoremen's Act. *Union Stevedoring Corp. v. Norton*, 98 Fed. (2d) 1012.

The \$7500.00 limit on compensation prescribed in the employees' compensation act in the District of Columbia has been held not to include medical benefit which can be paid in addition thereto. *Cardillo v. Liberty Mutual I. Co.*, 101 Fed. (2d) 254, and in *Norton v. Travelers Ins. Co.*, 105 Fed. (2d) 122, the \$7500.00 limit in the Longshoremen's Act was held not to include death benefit.

Although voluntary compensation had been paid by the employer for an apparently minor injury, where no claim was made to the Commission under the Longshoremen's Act until a serious aggravation of the injury one year after its date, the claim was held to be barred by the one-year limitation period. *Kobilkin v. Pillsbury*, 103 Fed. (2d) 667.

The District Court in *Price v. Travelers Insurance Co.*, 25 Fed. Supp. 894, (Texas), allowed death benefits to the legal wife of a deceased employee from whom deceased had been living apart for years, notwithstanding the fact that an equal sum had formerly been paid to a woman who had lived with deceased in a bigamous marriage believing herself, however, to be his legal wife.

The election of a workman himself to settle his claim for damages at common law against a negligent third party, was held in *Maryland Casualty Co. v. McCrary*, 29 Fed. Supp. 950, to be no bar to the claim of his dependents to benefits under the Texas Act after the death of the workman from those injuries. Compensation accepted by a workman in ignorance of his right to an election does not constitute a binding election under the Longshoremen's Act. *Johnsen v. American-Hawaiian S. Co.*, 98 Fed. (2d) 847.

An employee of an electrical subcontractor injured while voluntarily assisting in the installation of a plate glass window in the same building, was held not to be a temporary employee of the plate glass company and, therefore, not barred from bringing a common law action against it. *Pittsburgh Plate Glass Co. v. Carey*, 98 Fed. (2d) 533.

Insurance

On the subject of insurance, the Texas court held in *Huffman v. Southern Underwriters*, 128 S. W. (2d) 4, reversing the decision in 114 S. W. (2d) 926, that an agreement by the father of a minor son to release the employer, his heirs and assigns, from any liability to the son was applicable to the employer personally and not to the compensation insurance carrier.

In New Mexico the court held that where an insurance company accepted a risk and dated the policy back three days and where the accident occurred one day after the effective date of the policy, the insurer was liable under the policy. *Points v. Wills*, 97 Pac. (2d) 374.

An unusual situation was presented in *Standard Surety & Casualty Co. v. Standard Accident Ins. Co.*, 104 Fed. (2d) 492. The insurer covering the risk in 1934 paid an award for a hernia alleged in the compensation claim to have originated in 1934 but found by the commissioner to have developed in 1936. The 1934 insurer had contested the award in the appellate courts of Kansas and in the Supreme Court of that State, had first suggested in its brief that it had been on the risk in 1934 only and not in 1936. This contention was disallowed by that Court because the facts on which it was based were not part of the record. The 1934 insurer then brought an action for reimbursement against the 1936 insurer and was allowed recovery on the ground that no part

of the earlier proceedings had concluded its rights against the 1936 insurer.

A somewhat similar situation occurred in Wisconsin in the case of *Maryland Casualty Co. v. Ind. Comm.*, 284 N. W. 36. In that case an application for compensation was filed and the Industrial Commission proceeded against insurer A who was on the risk at the date of the injury alleged in the petition. On the hearing evidence showed injury at an earlier date and findings were made to that effect. As a matter of fact, insurer B was on the risk as of the date of injury actually found. Insurer A did not discover this situation until after the matter was pending in the Supreme Court on an appeal on the merits from a judgment confirming the award. The award was interlocutory. Insurer A then filed a new application for further hearing, bringing insurer B into the proceedings as a party. Insurer B was held liable for future compensation and that holding was sustained on appeal.

In Wisconsin, where the employer and insurer is required to pay into a State fund in death cases where there are no dependents and is given a cause of action against the third party tortfeasor, it was held in *Standard Surety Co. v. Spewachek*, 288 N. W. 758, that the fact that tortfeasor settled the deceased's claim for property damage and took a full release, did not afford protection against the employer's and insurer's claim for reimbursement on account of the payment to the State fund.

"Member of a Crew" of a Vessel

On the question of who is a member of a crew of a vessel, the following decisions are of interest:

The U. S. Supreme Court, *So. Chicago C. & D. Co. v. Bassett*, 60 Sup. Ct. Rep. 544, held an employee not to be a member of the crew of a ship which supplied coal to other vessels in the harbor where the inclusion of the employee as a member of the crew would be necessary to fill out the complement of the ship as shown in its certificate of inspection, but where the duties of an employee consisted merely in facilitating the flow of coal from the ship, in throwing the ship's rope and in occasionally doing some cleaning aboard and where the employee was paid a weekly wage and not employed under "articles," slept at home and boarded off the ship.

The District Court in *Kraft v. A. H. Bull*

Steamship Co., 28 Fed. Supp. 437, held that one was not a member of a crew of a steamship where his foreman was a member of the shore gang, where he held a Social Security card, where his work was entirely performed in New York harbor and where he did not eat or sleep on shipboard, even though 75% of his work was done aboard ship and was such as sailors are ordinarily required to do when a vessel is at dock.

A District Court held, *Montagna v. Norton*, 28 Fed. Supp. 997, that one is not a member of a crew where he is employed by the month as a fisherman for riding out to sea and assisting in tending nets for the purpose of transferring fish from the nets to the ship, then riding to the wharf and unloading the fish, after which he prepared the fish for sale and market.

A workman engaged in navigating a tug boat operated in connection with a dry dock company, who worked on an eight-hour basis, slept and boarded at home, was held not to be a member of the ship's crew. *Moore Dry Dock Co. v. Pillsbury*, 100 Fed. (2d) 245.

Claimant was held as a matter of law, not to be a member of a ship's crew where the ship was out of commission, was used solely for the purpose of storing soy beans at a pier and was merely warped back and forth along the pier so that the grain chutes could reach the hatches, the movements of the boat being made by hand. *Hawn v. American Steamship Co.*, 107 Fed. (2d) 999.

Res Adjudicata

In January, 1936 an award was entered for a partial disability in the leg. The Oklahoma Court upheld an award in December, 1936 for compensation for a back injury without any showing of a change of condition, holding that the question of the back injury was not determined in the original order. *Phillips Petroleum Co. v. Lane*, 86 Pac. (2d) 632.

The Washington court held in *Prince v. Saginaw Logging Co.*, 84 Pac. (2d) 397, that an employer could appeal from an order of the Department of Labor denying compensation on the ground that the employee was not within the scope of his employment, the grievance entitling him to appeal being that the findings subjected him to the hazard of a suit at common law. The Court held in the common law action that the holding

of the Commission that the claimant was not within the scope of his employment being unappealed from, was res adjudicata.

Conflicts of Laws and Extra Territorial Application

On the questions of conflict of laws and extra territorial effect, the U. S. Supreme Court in *Pac. E. I. Co. v. Ind. Acc. Comm. of Cal.*, 306 U. S. 493, held that the injured employee, a resident of Massachusetts who was regularly employed in Massachusetts as a chemical engineer under a written contract made in Massachusetts but who, in December, 1935 in the usual course of employment was sent by his employer to its branch in California to act as a temporary adviser where he was injured, was entitled to compensation under the California law, although the law of each of the two States by its own provisions, was exclusive. It also in *Paramino L. Co. v. Marshall*, 84 L. Ed. 545, (60 Sup. Ct. Rep. 600), held constitutional, a special act of Congress directing the review of an order for compensation under the Longshoremen's Act enacted after the time for review from a final award of the deputy commissioner had expired.

Where a workman was employed on a job to job basis his employment being terminated when each particular job was finished and where, after the completion of one job, while he was still in Texas he was offered further work by the same employer at a project in Louisiana compensation could be recovered for an injury received in Louisiana under the Texas Act, notwithstanding the fact that the claimant had accepted compensation from the Louisiana insurer, he claiming that he had accepted these payments under the mistaken belief that they were being made under the law of Texas. *Associated Indemnity Corporation v. Scott*, 103 Fed. (2d) 203. An employee of an airline originally hired in Sioux City, Iowa as tri-state representative at Minneapolis who later became a copilot on a run between St. Paul and Chicago, received his orders from officials in St. Paul and was paid there, was entitled to compensation under the Minnesota Act for an injury in Wisconsin because the business of the employer was "localized in Minnesota," *Severson v. Hanford Tri-State Air Lines*, 105 Fed. (2d) 622.

The California Court held in *McCoy v. Southern Pacific Co.*, 83 Pac. (2d) 970, that the Federal Employers Liability Act and the

State Compensation Act were not cumulative. An employee entitled to recover under one is not entitled to recover under the other.

The Indiana Court has held that its Act applies only to Indiana contracts or contracts made in contemplation of at least part performance in Indiana or to contracts in which the parties specifically agree to be bound by

such Act. *Fisher v. Mossman-Yarnelle Co.*, 113 N. E. (2d) 343.

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Malpractice

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THE subject assigned to me is that of "Malpractice." It is my purpose to mention a few of the outstanding particulars in which this type of case differs from the ordinary run of bodily injury claims. These points are probably well known to all of us. However, since these cases are much less numerous than some other types of claims, it is appropriate that we refresh our recollections from time to time.

The word malpractice strictly defined relates only to claims for negligence in administering treatments to patients. The subject will be considered however, in connection with the professional liability insurance provided under the "Physicians', Surgeons' and Dentists' Liability Policy." The policy covers a wider range than the liability falling within the strict definition of the word malpractice. We shall first consider the purely malpractice case and then consider the wider scope of the policy.

In approaching a malpractice case for the first time a claim man may get "the jitters" when he views a horribly disfiguring injury, or perhaps a death, as the result of which a malpractice claim has been presented against a policyholder. It is essential to bear in mind that in the ordinary automobile case, compensation case, and the more common types of casualty claims all of the pain and suffering and all of the crippling is chargeable against the tort-feasor. The whole injury constitutes the measure of damages. That is not true in the malpractice case. The patient was already injured or was already sick before he went to the physician. The whole injury, therefore, is not the measure of the liability of the doctor. The doc-

tor can only be responsible in damages for that part of the injury which is traceable to his failure to give proper treatment and care. Consequently when we look at a malpractice case in which some horrible injury was sustained or in which death occurred, we should not despair but should recognize the fact that people die every day and that every death does not mean some doctor has bungled.

There are many good definitions of malpractice. Corpus Juris says "Malpractice is bad practice, either through lack of skill or neglect to apply it, if possessed." 48 C. J. 1112. That definition affords a clue to one of the first considerations in handling a malpractice case. If there was no bad practice employed by the doctor he is not liable in damages, even though the recovery of the patient was not complete. To state the matter the other way around we might put it like this: In order to escape liability the doctor must show he used the proper method of treatment, and used that method properly. The word "skill" as used in the definition embraces two things: first, the knowledge of what method to use in treating the patient; second, the ability to properly use that knowledge. Compare this skill to the skill of a golfer. Some of us know how to play the game but we don't seem to be able to do it the way it should be done. Skill includes knowing what to do and also the ability to do it in the manner it should be done.

Since, therefore, the lack of skill on the part of a doctor may render him liable, the first inquiry should cover the degree of skill which is required of the particular doctor in the particular case. There is no one rule which applies to all cases; different doctors

in different localities and in different branches of the practice are governed by different rules. A method of treating a fractured leg used by a general practitioner in a little country town might be held to be good practice, while the same procedure followed by an orthopedic specialist in a large metropolitan center might be considered bad practice. There are two reasons for that. First, the country doctor handling all types of cases must be a "jack-of-all-trades." He is not expected to be as good at any one branch of the profession as a man who specializes in the narrow branch or special field, or who is practicing in a big city where there are many cases of his particular kind and where he has the finest of hospitals and equipment with which to take care of his patients.

There is no "rule of thumb" for determining the exact degree of skill which a doctor must possess. The following statements from Corpus Juris provide a good starting point. Of course, a serious case requires a careful review of the decisions in the particular jurisdiction involved.

"In the absence of a special contract to do so, a physician or surgeon is not required to exercise extraordinary skill or care or the highest degree of skill and care possible, nor, if not a specialist, the skill and care of the specialist or expert, but is only required to possess and exercise the degree of skill and learning ordinarily possessed and exercised under similar circumstances by the members of his profession in good standing, and to use ordinary and reasonable care and diligence, and his best judgment, in the application of his skill to the case." 48 C. J. 1113.

A further rule limits the skill required to that generally exercised by other doctors engaged in the same line of practice in the same general community. Sometimes it is said that the words a similar community, should be used instead of the same community. Various courts have expressed the rule in different ways. The long and the short of it is that recognition is given to the fact the country doctor does not and cannot practice medicine in the same way the big city doctor does.

However, a Minnesota case is cited as authority for the proposition that the country doctor of today is no longer a backwoodsman, so to speak, but that he has available to him

practically all of the facilities and the learning which is available to the doctor in the city, *Viita v. Fleming*, 132 Minn. 128, 155 N. W. 1077 LRA 1916 D. 644.

Going back to the original definition of malpractice, we note the latter portion of the definition refers to the doctor's neglect to apply the skill which he does possess. Little comment is necessary on this point. It would seem to demonstrate itself. If the doctor is skillful and through intention or carelessness fails to do the thing which he knows he should do and which he can do, he lays himself open to liability for whatever adverse result is caused by his neglect. The importance of this latter part of the definition is that many claimants try to bring their cases within that part of the rule. As a general thing, malpractice cases will fall into either the group in which the principal question is the scientific problem, whether the doctor used the proper method of treatment, or into the second class in which the doctor fails through haste or carelessness to give the right kind of attention to a particular case. It is the latter class of cases which are the hardest to defend.

When the adjuster starts out on a malpractice case he must, therefore, determine into which class his claim falls. He should determine just what criticism is made of the doctor's treatment of the case. It may develop that the plaintiff has no meritorious claim but feels aggrieved because his injury left him crippled. Frequently he just cannot pay his bill and fakes a claim as a smoke screen. Some dead-beats just do not want to pay the bill, but when they start out in the assertion of a malpractice claim they brood about their troubles until they "sell themselves" on the idea. Others fail in their original attempt to collect from the third party who caused their injury, then turn their guns on the doctor.

A careful investigation will frequently disclose that he is basing his claim on some point which is not sufficient to support a charge of malpractice. He may criticize a particular procedure which all doctors will agree was the proper method of treatment, or perhaps the only known method of treatment. A few examples will illustrate how the investigator can determine into which of the two classes the claim properly falls. Usually it will turn out that the patient is criticizing the method of treatment and that the defense consists of showing by proper

medical testimony that the doctor used the right method. A fat woman suffering from pneumonia was taken to a hospital. Among other remedies the attending physician applied electric heating pads to her chest, applying them with the heat turned on to its highest point. In due course she recovered from the pneumonia, but during the worst of her illness the pads had caused blisters where some of the rolls of fat flesh folded over the top of the pads. The blisters healed up, but she felt that she was disfigured. She sued the doctor. The defense was simply that heat was necessary, and even if it had been certain in advance that blisters would have been caused the doctor would have, and should have, chosen the lesser of the two evils. That was good practice.

In an obstetrical case the doctor left his home one morning to make his morning calls. Shortly thereafter the patient telephoned to say she was leaving at once for the hospital. She beat the stork to the hospital, and the blessed event was attended by another doctor. When the defendant doctor got there the baby had been born, the placenta had been expelled, and the patient bandaged. He did not explore the abdomen to determine that all the placenta had been expelled. He attended her to what appeared to be a normal recovery. Then the patient moved out of town. During a subsequent operation for the removal of her appendix it was found necessary to remove the uterus because of its diseased condition. Suit was filed alleging failure to follow proper practice in failing to make an exploratory examination to determine that all of the placenta had been discharged. The defense of that case was based upon proof that the best procedure prohibits such an exploratory examination, because of the danger of infection.

In the second group of cases, where the charge is made that the physician knew what to do but through haste or carelessness neglected to do the right thing, there may be made out a plain question of fact for the jury. A method sometimes used by claimants is to select some symptom which could be seen by the patient or the patient's family. They testify that they told the doctor about it and suggested that he do something, but that the doctor paid no attention to their suggestions.

A recently decided case is an example of that mode of proof. A child suffered a fracture of the tibia. A cast was applied

with a device for providing extension. Plaintiff's testimony indicated that after it had been extended once or twice discoloration appeared in the foot, that pain resulted, but that the doctor failed to do anything about it. Gangrene occurred with subsequent deformity of the foot. The appellate court held that a case was made for the jury.

It is obvious that in defending a case which involves the first part of the rule, that is, using the proper method and using that method properly, it becomes necessary for the claim man or attorney to consult with the insured about the method of treatment which he was using and whether it was proper. It is often necessary to bring in other reputable doctors to prove the customary method of treatment.

There is another factor which sometimes proves of great importance. That is the rule of evidence as to who can testify as an expert to establish that degree of skill by which the defendant is bound, or the method of treatment which should have been employed. There are many decisions on this subject. The cases are not uniform. However, the general rule is that the standard of skill must be established by the testimony of a physician practicing in the community where the defendant practices, or by one who is personally familiar with the methods commonly used and the degree of skill commonly possessed and exercised by a man in the same type of practice and in the same general community.

(Cal.) *Rasmussen v. Shickle*, 41 P. (2d) 184:

"It is a rule that proof of negligence or lack of care on the part of a physician consists only in the opinion of experts, that is, physicians familiar with the practice in the locality, and whose testimony is conclusive on the subject as against lay witnesses. To qualify as a witness a physician must show himself to possess learning on the subject, but also a familiarity with the treatment and degree of care and skill of other practitioners in the locality, sufficient to qualify him to say whether or not the defendant's treatment was consistent with what other physicians in the exercise of reasonable care might do under similar circumstances."

McGuire v. Baird, 70 P. (2d) 915.

Taylor v. Fishbaugh, 79 P. (2d) 174.

Bickford v. Lawson, 81 P. (2d) 216.
Warnock v. Kraft, 85 P. (2d) 505.
Lewis v. Johnson, 86 P. (2d) 99.
 (Conn.) *Geraty v. Kaufman*, 162 A. 33.
 (Ind.) *Iterman v. Baker*, 15 N. E. (2d)

365.
 (Iowa) *Kirchner v. Dorsey*, 284 N. W. 171.

(Mich.) *Sampson v. Veenber*, 234 N. W. 170.
Sima v. Wright, 256 N. W. 349.

(Minn.) *Berkholz v. Benepe*, 190 N. W. 800.

(Wis.) *Paulsen v. Gundersen*, 260 N. W. 448.

Upon first thought it might appear that a plaintiff would encounter no difficulty in proving the general practice in a given case. Decisions show, however, that some plaintiffs have found this to be a fatal weakness in their cases. There will be instances where all of plaintiff's efforts will fail because of his inability to find a satisfactory doctor to testify that the practice employed was not the right practice, or to find a doctor who is willing to criticize the defendant doctor and who is, at the same time, qualified to testify as to the standards and practices of the community in question. The claim man should attempt to learn what doctors have treated or examined the plaintiff after his "falling out" with the defendant. He can then determine whether such doctors are competent to testify under the rules.

A companion rule is that the defendant is to be judged by the practices of the school of medical thought to which he adheres and according to which he practices. Thus an osteopath is not to be judged by the practices commonly followed by "M.D.s" and vice versa. Even among medical doctors there are different schools of thought, as for example the allopaths and homeopaths.

(Kan.) *Riggs v. Gouldner*, 96 P. (2d) 694.

(Idaho) *State v. Smith*, 25 Idaho 541.

(Iowa) *Van Sickle v. Doolittle*, 169 N. W. 141.

(Pa.) *Remley v. Plummer*, 79 Pa. Super. 117.

In any given case these rules require careful study. For that reason it will not be worth while to consider them at length here. However, the brevity of their discussion should not be taken as an indication that they are unimportant.

There are two rules which are corollaries and which are of first rank importance in the handling of malpractice cases. The first rule is that a tortfeasor is liable for the full extent of the injury suffered by a plaintiff through the tortfeasor's negligence even though the injury be aggravated by malpractice on the part of the attending physician. That rule is pretty generally followed. The corollary, and the one in which we are more particularly interested in malpractice cases, holds that a judgment against the tortfeasor, if it purports to be a full recovery for the whole injury, will constitute a bar to a suit against the physician for malpractice. Thus a full release given to the tortfeasor who caused the original injury bars a suit against the doctor. The theory is that the plaintiff has already recovered in full for his injury, and the law does not permit him to recover twice for his whole claim or a part of the whole.

(Fla.) *Sands v. Wilson*, 191 So. 21.

(Mass.) *Sacchetti v. Springer*, 22 N. E. (2d) 42.

(N. Y.) *Milks v. McIver*, 263 N. Y. S. 595.

(N. C.) *Smith v. Thompson*, 188 S. E. 395.

(Pa.) *Thompson v. Fox*, 192 A. 107.

(W. Va.) *Mier v. Yoho*, 171 S. E. 535.

See also 50 A. L. R. 1106, 82 A. L. R. 922, 112 A. L. R. 553; Key Number Digests, Subject Release Section 27.

It is, therefore, essential in handling these cases to determine how the original injury was sustained if it was traumatic in origin. If the malpractice case arises out of the treatment of a disease not traumatic in origin these rules are not involved. The investigator's next task is to determine whether some recovery has been made against the original tortfeasor. Cases in which the original injury was sustained in a compensable accident have raised the question whether the payment of compensation in full for the plaintiff's injury by his employer or by the compensation insurer operated in the same manner as a common law release in a common law case. While it cannot be said that all jurisdictions will recognize the rule that the compensation recovery will bar the suit against the physician for malpractice, it has been so held in a few states.

(Iowa) *Payne v. Wyatt*, 251 N. W. 78.
(Mo.) *Hughes v. Maryland Cas. Co.*, 76
S. W. (2d) 1101. *Hanson v. Norton*, 103
S. W. (2d) 1.

There is at least one case in which it was held that the employer or compensation insurer was subrogated to that part of the injured employee's claim which was attributable to the negligence of the physician in rendering treatment.

Up to this point we have been considering the liability of the practicing physician, surgeon or dentist to his patient. It was mentioned that there is a difference between the measure of his liability under the law and the coverage provided under the professional liability policy. There are a few features of this policy which are radically different from the corresponding provisions of the general run of casualty insurance policies.

One of the most important provisions to be kept in mind is that prohibiting the settlement or compromise of a claim or suit covered by the policy without the written consent of the insured. The reason for that provision lies in the value of a doctor's reputation and his consequent jealousy of that reputation. Almost without exception these professional men are willing to go to great lengths and to fight to the bitter end a false charge of negligence. In such cases they, of course, refuse to consent to any settlement.

The policy contains a cooperation clause similar in effect to that in the automobile policy providing that the insured shall cooperate with the company, attend hearings and trials, assist in securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits. Because their reputations are at stake doctors heartily comply with this requirement of their policy.

The cooperation of the insured is perhaps more essential in preparing the defense of these suits than in other types of bodily injury claims. In the first place, questions of medical theory and practice are involved and cannot be adequately prepared for presentation in court without the assistance of a doctor. The testimony of other doctors on the question of proper practice may be necessary. Other doctors will cooperate with the defendant in protecting his reputation much more readily than they will cooperate with an insurance company merely to save that company money. Most physicians and dentists,

through their local medical or dental society, will know the leaders in the various branches of their professions, whose advice will be of great value in the preparation of the technical and scientific aspects of a case. The insured will know what medical records are important. He will have entree to hospitals and medical records which will not be available to claim men.

Doctors and dentists are busy men. Their hours are precious. It is generally hard to get a doctor to take an hour or two from his business day. Nevertheless, if given time to arrange his schedule he will invariably work in the necessary conferences on the claim or suit in which he is involved. Most claim men have cooled their heels in the anterooms of doctors trying to get just a few minutes of their time to secure medical reports on a personal injury case. As a consequence they have the deepseated conviction that it is not possible to get a doctor to take any considerable period of time to go thoroughly into the defense of a law suit. Nevertheless if a doctor is asked to arrange a time when he can sit down and go thoroughly into his case he will be found anxious to do what he can and willing to take the time reasonably necessary to thoroughly analyze the case and to prepare the defense. His pride in and jealousy of his reputation insures that. At the same time, the mere fact that a busy doctor finds it difficult to arrange for an hour or more of conference should not lead to the hasty conclusion that he is unwilling to help. Give him a few days and he will arrange his schedule. The claim man should also be willing to go a little out of his way to arrange a convenient appointment.

In defending a malpractice claim under a professional liability policy it should be remembered that it may be as important to the doctor from the pure dollars and cents angle as it is to his insurer. His reputation is at stake, and his reputation is his "stock in trade." A claim man must not overlook his obligation, to make a thorough preparation of his case. It will be advantageous to consult the doctor on new developments and to discuss with him the progress of the litigation from time to time.

The "declarations" of the professional liability policy are of great interest. The investigator might well start his work by carefully examining the "Declarations" of the policy which give, or should give, a pretty good picture of the insured, his experience

and his practice. Any variation between the answers given to the questions in the declarations and the facts as disclosed by the investigation may have a very decided effect upon the defense of the case as well as upon the investigator's recommendations as to the desirability of the risk. A situation might arise at some time where coverage could be questioned because of a false answer in the Declarations. The Declarations of these policies are more important than those of the average casualty policy.

Another portion of the policy requires careful attention. That is the Insuring Agreement. The latest printing of this policy reads as follows:

"To pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law, because of any claim or suit for damages, including the return of professional fees, for malpractice, error, mistake, assault, slander, libel, undue familiarity, anesthesia hallucination, personal restraint or any other breach of professional duty, at any time filed, based on professional services rendered or which should have been rendered by the insured, a partner, assistant, nurse, agent or any other person during the policy period provided herein; and because of any claim or suit for damages growing out of autopsies, inquests or the dispensing of drugs and medicine."

The inclusion of error, mistake, assault, slander, libel, undue familiarity, anesthesia hallucination, and personal restraint are probably due to the fact that claims of this type, while they are not necessarily true malpractice claims, are nevertheless the bases for many lawsuits against professional men. While many of such suits are groundless, this is another instance where the defense feature of the policy, independent of the indemnity against judgment, is alone justification for buying this coverage.

Time will not permit consideration in great detail or at great length of the many different cases which might be embraced within the terms of the insuring clause. It is important to remember that the professional liability policy covers the policyholder for a great many things in addition to his failure or alleged failure to render the proper treatment. When a suit is filed against a doctor the insuring clause must be carefully read to determine whether coverage is provided.

In conclusion let me repeat that malpractice cases should not be prejudged nor considered hopeless merely because the plaintiff is in a pitiable condition. Cases of this type are considered by plaintiff attorneys as being the hardest of all cases in which to make a recovery. They offer to claim men the possibility of a high percentage of wins and are perhaps as interesting to handle as any type of case.

The Paddleford Case

By CHARLES H. MCCOMAS

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THE case of *Paddleford & Lamy v. The Fidelity and Casualty Company* and the companion case of *Paddleford & Lamy v. The Hartford Accident and Indemnity Company* were decided by the Circuit Court of Appeals for the Seventh Circuit on November 17, 1938, and are reported in 100 Fed. (2) at Page 606. The decision is so revolutionary as to warrant discussion of its effect upon the insurance business generally though the contract involved was a broker's blanket bond.

The bonds issued by the surety companies to the plaintiff were the Standard Form

Broker's Blanket Bonds, and were drawn in the form which has been universally followed for years—granting the general coverage against loss due to dishonesty of employees in the insuring clause and appending the limitations and exclusions under the language—"The foregoing agreement is subject to the following conditions and limitations." The limitation which is discussed in this article was expressed as follows:

"This bond does not cover . . . (f) any loss resulting directly or indirectly from trading, actual or fictitious, whether in the

name of the insured or otherwise, and whether or not within the knowledge of the insured, and notwithstanding any act or omission on the part of any employee in connection therewith or with any account recording the same . . ."

It is the Court's decision as to the effect of this limitation that gives the case its revolutionary character.

From the beginning of the history of insurance it has been the practice of the insurer to prescribe the limitations upon which his liability for the loss insured against is conditioned. Wide coverage against a general hazard, without condition or limitation could not be assumed at a price which those seeking the protection could afford to pay. The degree to which it was necessary to restrict general coverage was born of long experience, and as the business developed and experience broadened, the effort was made, and still is, to curtail the restrictions and liberalize the coverage. This has been the rule of development of broker's and banker's blanket bonds as well as policies of straight insurance.

However, from the beginning and all through the development of insurance, in drafting the contracts, it has been the uniform practice to insure against a particular hazard, such as death, fire, accident, or dishonesty, and then append the terms and conditions, if any, which limit the liability of the insurer. Such contracts have been uniformly sustained by the Courts. It is true that the Courts inveighed against the practice of an earlier day of printing the limitations and exclusions in such inconspicuous type as to escape the attention or discourage the attempt to study them carefully, and the practice led to the adoption by many of the States of statutes requiring the use of certain sizes of type which would be easily legible.

In the case of *Phoenix Insurance Company v. W. H. Slaughter & Co.*, 12 Wall. 404, the Supreme Court said:

"If the insurance company does not mean to take risks . . . then good faith to the assured requires that they should declare their intention in terms which cannot admit of controversy, and in order to avoid just cause of complaint it would be better to employ type in relation to this important subject large enough to arrest the attention of the interested party."

Many cases containing language of similar import can be found in the decisions rendered at the time the practice condemned by the Courts was more or less in vogue.

However, no Court has ever held that the general coverage granted by the insuring clause of a policy cannot be limited by the "terms and conditions" which are the usual and customary provisions of contracts of insurance. No case has been found where the Court has held that the general coverage of a policy cannot be restricted, modified, or limited by proper language. In fact, it is standard practice to insure generally against a specific hazard, and then state the terms and conditions upon which the indemnity will be paid.

The bonds in controversy in the *Paddleford* case were in the standard form and the "conditions and limitations" to which the insurance was subject were clearly printed in the body of the bond under the language—"This bond does not cover." Then follows among others, clause (f) which is quoted earlier. The insuring clause indemnified the obligees against any loss "through any dishonest act of any employee wherever committed, and whether committed directly or in collusion with others." In addition to this coverage the bond also protected the obligee against loss "through larceny whether common law or statutory, robbery, burglary, hold-up, theft or other fraudulent means or destruction, misplacement or unexplainable disappearance;" also against loss by larceny, robbery, etc., on the premises and of property while in transit. The loss to the plaintiffs was caused by the concededly dishonest acts of an employee.

In this article we will consider only the language of the decided cases which bears directly on the effect of exclusion clauses, because this is where the *Paddleford* case, by a curious process of reasoning, clearly cuts across the body of decisions holding such clauses good.

The effect of the particular exclusion in controversy in the *Paddleford* case has been considered in several cases. While in some of the cases recovery was allowed because the losses were held not to fall within the exclusion clause (were not due to trading), in none of the cases was it held that the clause was ineffective.

In the *Schluter & Green* case, 93 Fed. (2) 810, the Court held that the loss was due to the misappropriation of the funds of the

employer, and that the "trading clause" of the bond was not involved, even though the stolen funds were used to pay balances due by the employee to an outside brokerage house with whom she was conducting trading operations. See also *Cohon v. U. S. F. & G. Co.*, 13 N. Y. S. (2) 976.

In the case of *Harris v. National Surety Company*, 258 Mass. 353 (155 N. E. 10) the losses were held to be trading losses and liability therefor was excluded even though the employee was dishonest. At Page 11 the Court said:

"As the language of the bond is free from ambiguity, it is to be given its plain and customary meaning."

In *Earl v. Fidelity & Deposit Company*, 32 P. (2) 409, the Court said at Page 411:

"That the loss was one suffered in a trading transaction cannot successfully be disputed Respondent places his main stress upon the contention that the loss was caused by the "fraud and dishonest" act of Gatlin *This contention of respondent in no wise answers the argument that the loss was one incurred in trading.*"

Recovery was denied.

In *Rath v. Indemnity Insurance Co.*, 38 P. (2) 435, (where the same exclusion as that in the Paddleford case was involved), the Court said at Page 436:

"Under the terms of the exonerating provision of the bond *it is immaterial whether the loss in a trading transaction was occasioned by the dishonest act of an employee or not. The very language and its place in the contract carry conviction that the exonerating clause limited the dishonesty clause, and has the effect of relieving the surety from liability for any dishonest act of an employee committed in a trading transaction resulting in loss.*"

In *Security Trust & Savings Bank v. New York Indemnity Co.*, 31 P. (2) 365, the Court said at Page 368:

"While we readily recognize and approve the principle that ambiguities and inconsistencies should be resolved against

the insurer and in favor of the insured, we fail to see its application to the bond under consideration. We are unable to ascribe (sic) to the reasoning which suggests that because the general coverage clause B insures against all thefts, the exception or limitation clauses excluding losses resulting from forgery, or growing out of a loan, must be so construed as to exclude such losses only when there is an absence of the element of theft. To so interpret the bond would be novel to say the least, and would serve to nullify the exception or limitation clauses in important particulars. *The very purpose of exception or limitation clauses is to exclude risks otherwise covered by general coverage clauses.* It is of their nature to conflict with general clauses in that they constitute restrictions on the latter."

In the Paddleford case the Court disposes of these cases, which it seems should have been at least persuasive, thus:

"While we give respectful consideration to the views expressed by other Courts yet the construction which should be placed upon the controverted provisions of the bond in question is our responsibility."

(See also *Harris v. Indemnity Ins. Co. of North America*, 93 Fed. (2) 459; *Mitchell v. Constitution Ind. Co.*, 169 S. E. 527).

In its opinion the Court concedes that:

"The losses come within subsection (f) of said Section 2. . . . They were the result of Ciesler's trading activities and while fraudulent and fictitious and unknown to the plaintiffs were the result of trading within the scope of his employment . . ." The pleadings and facts "upon which the case was tried leave no doubt on this point." Page 611.

However, without specifically finding there was ambiguity or inconsistency, the Court assumes a basis for "construction" and then proceeds to nullify the plain terms of the contract and makes a new one for the parties. The Court finds that the language of the exclusion clause "was not intended to exclude coverage of any loss incurred through a 'dishonest act'." Then by a most curious process of reasoning the Court proceeds to justify this conclusion in the following language:

"We reach the conclusion that the language of the bonds which indemnified the plaintiffs against any loss incurred 'through any dishonest act of any of the employees, wherever committed and whether committed directly or by collusion with others' was intended to and did indemnify the plaintiffs against the very type of loss which they sustained in this case and that the language of sub-section (f) was not intended to exclude coverage of any loss incurred through a 'dishonest act.' We think this construction does no violence to the language of sub-section (f) and does not render it nugatory as claimed by the defendants. It is reasonable to conclude that it was intended, not as a limitation upon losses sustained through the dishonest act of an employee, but rather upon those which were not dishonest, and we apprehend, in a business of this character, there are many losses the result of acts other than those dishonest. For instance, trading losses incurred by plaintiffs through their own trading or through trading by customers who fail to meet their commitments, or because of mistakes made in filing orders for customers, or for negligence in failing to insist that the accounts of customers be properly margined, or errors of employees in recording trades, or in failure to notify customers of purchases or sales, or numerous other types of losses which brokers, no doubt, suffer on account of trades which are not the result of the dishonesty of an employee. . . . If this contract was not for the purpose of protecting the assured from the dishonest acts of its employees, committed in the usual course of its business, it is difficult to comprehend

what purpose it served. Surely it did not furnish coverage for dishonest acts occurring in some business other than that in which plaintiffs were engaged. Defendants argue that this construction nullifies sub-section (f); that there was no occasion to place a limitation upon acts other than those dishonest as they were not covered by the insuring clause. Even if this argument is tenable, there are equal grounds for concluding that defendant's construction would nullify the insuring clause and would reduce the protection afforded by its bond to a mere shadow, irrespective of the fact it was paid a rather substantial consideration."

It will be noted from the quoted language that the effect given to the exclusion clause is that it excluded liability only for losses *which are not covered by the bond at all*. The Court entirely overlooks the fact that all forms of dishonesty are covered except those excluded and that many acts of dishonesty (embezzlement, theft, misapplication etc.), having nothing to do with trading, could result in loss to the employer.

If this decision has the effect which it seems to have, surety and insurance companies will have to find new ways to limit the general coverage afforded by the insuring clauses of their contracts. Such phrases as—"subject to the following terms and conditions"; "provided however"; "this bond does not cover"; "subject to the following exceptions and limitations"; "warranted free of all claim" (Lloyd form), apparently have become ineffective to accomplish the purpose for which they have been used throughout the history of insurance.

Insurance Counsel and the Claims Bureau

By BARENT TEN EYCK

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ATTORNEYS who do defense work in the field of casualty insurance and suretyship should be aware of the many ways in which they can cooperate in the work being done by the Claims Bureau. Those who represent stock companies in this field already know that the Claims Bureau is a di-

vision of the Association of Casualty and Surety Executives, whose membership consists of more than sixty of the outstanding stock companies. By giving this cooperation counsel will not only benefit their clients, through multiplying the effectiveness of the Claims Bureau, but will also benefit themselves in-

asmuch as they will thus better serve their clients, increasing the confidence those clients will place in them.

I bespeak the cooperation not only of counsel for stock companies but also of those who represent mutual insurance companies and self-insurers. While the Claims Bureau is the creature of the stock company Association, its efforts against fraud equally benefit all organizations against which liability and Workmen's Compensation claims are made. Indeed, some of these non-stock interests, conscious of the importance of our tasks, have lent their support to our work in certain parts of the country.

The Claims Bureau operates throughout the whole United States except for the State of Massachusetts, which is served by an independent investigative agency supported by all claims interests in that state. It has offices in New York, Newark, N. J., Cleveland, Chicago, Atlanta, Dallas and Los Angeles. Each of these offices serves a considerable area. As against this broad spread of working units it can be hazarded that there is hardly a community in the nation, of any size, which lacks attorneys who engage in the handling of claims and in the defense of law suits based on claims. It needs no argument to demonstrate that this great body of insurance counsel can be of immense value as an adjunct of the Claims Bureau's personnel.

Our personnel is well equipped by training and experience to man the front line trenches in the war against fraud. The insurance counsel is equally well equipped, acting as a scout and lookout, to bring to our attention the fraudulent cases which crop up in his practice.

A principal objective of the Claims Bureau, to further the prompt and just settlement of meritorious claims, is completely unrelated to the repression of fraud. The Claims Bureau, as an agent of stock companies which realize their obligation to the public, is glad to learn of opportunities to improve methods of handling claims. It is glad to know of instances in which claim practices, or methods of procedure governed by law or by rules of court, can be reformed so as to expedite the settlement of meritorious claims. In the past it has been instrumental in bringing about procedural reforms, and changes in practical mechanics, which have checkmated waste in claims administration, thereby benefiting claimants as well as the companies. In such

matters as these insurance counsel can often point us the way.

However, insurance counsel can be particularly helpful to the Claims Bureau in the accomplishment of its second most important task, which is to fight the fraudulent claim and the occasional professional man, physician or attorney, who is guilty of unethical professional practices. A third prime function of the Claims Bureau, related to the second, is to maintain and operate an organization for the exchange of claim information. This organization, known as the Index System, consists of nine Index Bureaus, operating with uniform methods and integrated under one control, situated at strategic points throughout the nation.

Some insurance counsel, whose offices are in communities in which the companies do not maintain claims offices, serve their clients in the handling and adjustment of their claims. Others limit their representation to work in the courts. Those attorneys in the first class have an outstanding opportunity to help us in our work. Well trained and broadly experienced in the law, they should be better able than a non-professional claim man to detect evidence of fraud whenever it appears. When they do detect it they can be sure that the Claims Bureau will welcome a statement of the facts, and in proper cases will act by giving thorough investigation with a view to presentation to the authorities for criminal prosecution or appropriate disciplinary action.

Many attorneys who handle the adjustment of claims are authorized agents of their clients to report claims to the Index System for a check of the claimants' past claim histories. I can not too strongly stress the importance of reporting all cases which, under the rules of the Index System, are reportable. Authorized reporting agents are of course familiar with these rules, which are set forth in instructions issued by the Index System. It is of equal importance that the reporting of claims be as full and detailed as possible. The efficiency of the Index System in turning up past claim histories is in direct proportion to our ability to identify the claimant in the case reported. Since there are often many claimants of the same name this ability depends upon the reporting agent's including in his report all the identifying information he can get, such as the claimant's date of birth and his physical characteristics.

Full use should also be made of the Claim

Bulletins, periodically sent out by the Claims Bureau, which contain records of persons who have made claims suspected of fraud. These Bulletins, most of which bear pictures of the claimants involved, have been the means of defeating many fraudulent claims. They have also led many culprits to the bar of criminal justice. Whenever the subject of such a Bulletin turns up the Claims Bureau should be notified immediately.

Counsel whose representation of insurance interests is limited to trial work are perhaps less favorably placed to assist in our work. None the less there are many things they can do, and I hope they will be alert to their opportunities. First, it will be helpful to them as well as to us, if they make sure in preparing for trial that the claim has been reported to the Index System. Information available in its voluminous card files may make the difference between success and failure in the defense of the case. Experienced trial counsel do not need to be told of the stunning effect achieved by surprising a plaintiff who takes the witness stand with a series of questions founded on incontrovertible facts which contradict testimony already elicited from him. We all know that turns of this kind in a trial have often converted seeming defeat into victory.

When the attorney's office handles the preparation for trial it should never be forgotten that a witness' written statement, carelessly taken, may hopelessly prejudice the success of possible future criminal prosecution on a charge of obtaining money by false pretenses, or of perjury. Particular care should be exercised in any suspicious case, even though the evidence to support a charge of fraud or perjury has not yet been unearthed, to avoid bringing into existence any paper which, through failure to think ahead to the effect it might have if produced at a criminal trial, would strengthen the defense in a criminal trial.

Let me illustrate with an actual case. A woman liability claimant was treated immediately after her accident by a doctor previously unknown to her. Shortly afterward the insurance company's investigator saw her. She was satisfied with his offer of settlement and desired to settle direct with the company. He gave her a report relating to her physical condition which he said should have her doctor's signature. The doctor refused to sign it and instead called at her home and suggested that she retain a lawyer,

adding that he would send a friend. She said she was not interested in having a lawyer because she had been fairly treated and was seeking only a fair return for her injury. Within two hours an attorney called at her home and spent a long time trying to persuade her to retain him. Fortunately, the claim was settled promptly and equitably. The investigator took a very brief written statement which omitted any reference to the very important point that the claimant had told the doctor she did not want a lawyer. This statement would have been fatal in any prosecution of the lawyer or doctor, under a criminal statute, which was available, for solicitation of legal business. Their defense obviously would be that the claimant had indicated interest in having a lawyer and that the doctor, with all propriety, had merely offered to send his friend. While the woman, as a witness, could have recounted the whole conversation, thus giving an entirely different weight to the subsequent appearance of the lawyer, she would have been subject to powerful attacks on cross examination suggesting that this part of the story was a later invention since it did not appear in the signed statement.

It sometimes happens that at the trial itself, for the first time, facts are developed which indicate the existence of fraud. Counsel should always bear in mind that the Claims Bureau wants to know about these cases. When such a case is not reported the lead is lost and the result is one more crime unpunished.

Let me add a word of caution. The Claims Bureau has a few rules of policy which exclude the investigation of certain types of cases. First, we do not investigate any case in which the defrauded company is aiming primarily at restitution. We recognize that prosecuting authorities should not be asked to serve as collection agencies. Second, since our investigative man power is not unlimited we give preference to cases involving organized fake claim rings and groups of ambulance chasers. Third, we can not handle cases which are merely suspicious. While it is not necessary that the proof of fraud be fully developed when the case is presented to us, there must be some concrete evidence that a crime has been committed. Fourth, cases in which civil litigation or civil settlement is pending are not ordinarily accepted. When fraud really exists we believe our chances of successful prosecution are in-

creased by allowing matters to run their full, normal course. It is true that this rule may involve the loss of money which could otherwise be saved, but experience indicates that a high percentage of success in prosecutions is the most important thing. The insurance industry as a whole benefits more by the deterrent effect of convictions than by the defeating of unjustified individual claims.

With these qualifications, I repeat my in-

itation to insurance counsel to act as collaborators of the Claims Bureau. Only with your assistance can the Bureau achieve its maximum effectiveness in doing its job, thereby stamping out fraudulent and unethical practices, preventing raids upon the premium dollar, and preserving that dollar intact for the benefit of the public which buys insurance and the public which has honest claims to present.

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White Sulphur Springs,
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